

**THE CANADIAN OMBUDS/MAN/PERSON:  
IMPARTIAL AND INDEPENDENT  
ASPIRATIONAL, ACHIEVABLE OR IMPOSSIBLE?**

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## **Abstract**

This study is the first of its kind to examine the conceptualization and the validity of the principles of impartiality and independence as they are understood and implemented by Canadian Ombuds of general jurisdiction. Twenty interviewees with substantive Ombuds experience drawn from all geographical sectors of Canada and from all areas of Ombuds practice, provided insightful commentary resulting in the finding that impartiality can only be understood, implemented and defended as aspirational in nature. As human beings can not purge themselves of their knowledge and experience that create negative or bad biases or predispositions, both known and unknown, this information colours all that is seen and influences all actions taken and conclusions reached. Simultaneously, it is also clear that there should not be any attempt to become a blank slate as the self-knowledge gained through introspection plus as much familiarity as is possible with the experiences had by those that are different from our own is necessary for thinking and behaving as impartially as possible.

Compelling evidence is provided to show that the aspiration to impartiality, which by definition will always be a work in progress, requires continual, concerted intellectual and behavioural attention and effort. In a similar vein, it is also revealed that the perception of a high degree of impartiality is based not on the so-called 'guarantees' provided by traditional indicia of structural independence but rather on the strength of the Ombuds' independent mindset and resultant ability to think and act independently and to be perceived as thinking and behaving impartially. The findings presented which include strategies for increasing impartiality as well as the conditions which can both contribute to and/or take away from the perception of independence will also benefit the legal field

generally as they are readily applicable to other third party roles which are designated as independent and impartial, such as judges, adjudicators, arbitrators and mediators.

As the role of Ombuds has been created and implemented in an idiosyncratic manner across Canada, in order to provide the necessary contextual underpinning for this study, initially, I put forward a historical foundation. Here I propose a taxonomy detailing the three types of Ombuds that operate in Canada: the legislative, hybrid and organizational Ombuds. Again, using both historical and contemporary vantage points, I examine the theoretical constructs of impartiality and independence on a general basis, given their centrality to this study and to the legal field generally. In addition, I survey the data derived from empirical research from five major studies of judicial decision-making and one administrative tribunal. These results are complemented by data derived from ADR scholars and practitioners' examination of their own and others' practices. All of the foregoing material demonstrates how unrealistic it is to operate on the premise that impartiality is predicated primarily on a high level of structural independence.

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## **Introduction and Overview**

This dissertation explores the conceptualization, validity and implementation of the principles of independence and impartiality, as well as their connection to fairness in the practice of legislative, hybrid and organizational Ombuds<sup>1</sup> in Canada. The principles of independence and impartiality are touted by scholars and practitioners, both historically and contemporaneously, as essential characteristics of Ombuds. This is true whether the role was created recently by the University of British Columbia or was established by the House of Assembly in Newfoundland and Labrador or by the Bank of Nova Scotia many years ago. I explain why impartiality and independence are considered foundational principles and how they have been defined from a theoretical perspective and are implemented in actual practice. However, as the role of Ombuds is practiced differently depending on where, when and how it was established in Canada, I add clarity to the discourse by identifying what I consider to be the three primary categories of Ombuds practice. I have defined these according to standard criteria which include structure, powers and enabling legislation or administrative platform so as to demonstrate what the Ombuds institution looks like in Canada in the twenty-first century. The three categories include:

- 1) **'Parliamentary, legislative or classical'** which is established by legislation as an independent entity, with inquisitorial powers and reporting to a Legislature;
- 2) **'Hybrid'**<sup>2</sup> which is established by policy or terms of reference but maintaining some of the characteristics of the legislative Ombuds, such as inquisitorial powers, and some degree of

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<sup>1</sup> For ease of reading I will use the term 'Ombuds' to apply to all Ombuds/Ombudsman/person roles and will only use the specific name of the role if identifying a particular position.

<sup>2</sup> Linda Reif, a Canadian legal scholar, who has written extensively on the practice of legislative Ombuds has used the term 'hybrid' to define legislative Ombuds who are also responsible for reviewing complaints of human rights violations. I have chosen to use the term 'hybrid' as well but have defined it differently as I think it is reasonable to consider any role that has maintained many of the characteristics of the original version as well as adding on different ones as a 'hybrid' as opposed to restricting its use only to Ombuds who have oversight of government administrative activity and who also handle human rights complaints.

structural independence. In making use of the term 'hybrid' in this context I am not indicating this form of Ombuds is the offspring of the legislative and organizational models; rather, I am using this term to demonstrate that this type of role has some, but not all characteristics of the legislative role and shares some of the characteristics of other dispute resolution modalities.

3) '**Organizational**' which is established by policy or terms of reference, and frequently reports to the head of the establishing organization and generally does not have the authority to investigate as part of an inquisitorial process.

While Nathalie Des Rosiers has concluded that there are two basic types of Ombuds in Canada, namely, the public or 'classical' role that is founded by legislation and the 'organizational' or private role that is found within corporations or Universities,<sup>3</sup> it must be emphasized that a third category, that being 'hybrid' Ombuds role, are also well established within the Canadian context. Further, both within the private and public sectors, Ombuds roles have been established differently than as envisioned by Des Rosiers. For example, within the private sector two different types of Ombuds roles have been put into place within the same entity, that is, Canadian banks. For instance, bank Ombuds who investigate complaints from clients have strong powers of investigation and operate in the 'hybrid' model and bank Ombuds who respond to employee complaints operate in the 'organizational' model and do not investigate.<sup>4</sup> Hence, two different models of Ombuds practice co-exist in

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<sup>3</sup> Nathalie Des Rosiers & Audrey Bockor "The Functions of an Ombudsman: Annotated Bibliography" at 2. This is background material produced to support the presentation entitled 'The Many Roles of an Ombudsman' for The Forum of Canadian Ombudsman Conference, Ottawa, 1 April 2003) at 2 [unpublished]. Posted at [www.ombudsmanforum.ca](http://www.ombudsmanforum.ca) under 'Resources, Conference Speeches'.

<sup>4</sup> The Royal Bank of Canada (RBC) Ombudsman Office describes its service for clients as being impartial and voluntary indicating its staff are trained in effective listening, fact-finding and mediation. Reference is made to investigations that focus on the facts and fairness being determined. In addition, its annual reports and case studies relate solely to client issues. However, under the tab of "Who We Are" reference is made to Deputy Ombudsman and Employee Ombudsman: Ken Brown, who deals with employee complaints. This function typically operates in the organization model of practice and does not issue public reports. "Office of the Ombudsman" (1995- 2012) online: Royal Bank of Canada <<http://www.rbc.com/ombudsman>>.

the same corporate body in the private sector. Operating in a parallel fashion, government departments which are typically known as 'public sector' have established Ombuds roles which operate either in the organizational model or the hybrid model and are not established by legislation.<sup>5</sup> In addition, I would argue that universities and by extension, colleges, hospitals and not-for-profit organizations, are more of a public organization than a private organization and Ombuds in these settings typically have an investigative mandate yet are not established by legislation. These examples alone demonstrate that the dichotomy of 'classical' legislated Ombuds being the purview of the public sector and 'organizational' Ombuds operating only in the private sector is not viable.

As one might expect there are a wide variety of permutations of the original concept now in existence both in Canada and worldwide. In fact, the continuum of ombuds activity that is reported on by various media extends from the establishment of an Ombudsman for the National Geographic Traveler magazine who will look into complaints about the accuracy of hotel ratings provided online<sup>6</sup> to the announcement made by the United Nations Security Council at the end of 2009 of its intent to establish an Office of the Ombudsperson to deal with complaints regarding the list of people and organizations that are believed to be attached to or involved with Al-Qaida and the Taliban.<sup>7</sup> Given the immense number of Ombuds roles globally, this study is necessarily focussed only on Canadian regimes.

The achievability of impartiality and independence is now under siege as a result of day-to-day observation and experience as well as the dissemination of research findings

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<sup>5</sup> Health Canada has established an Ombuds role that handles only employee complaints using the organizational model. See Ethics and Internal Ombudsman (23 January 2009), online: Health Canada <<http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/paccb-dgapcc/omb/index-eng.php>>.

<sup>6</sup> "Seeing the light about Hotwire ratings for hotels" Dallas News (13, December 2009), online: Dallas News <<http://www.dallasnews.com>>.

<sup>7</sup> United Nations, News Release/Communiqué, 423268, "Security Council Authorizes Ombudsperson for Al-Qaida Sanctions Regime" (17 December 2009), online: UN <<http://www.unmultimedia.org>>.



that raise questions of systemic bias in the decision-making patterns of the judiciary both in the United States of America (U.S.) and Canada. Accordingly, it is timely to examine these findings and the arguments from both historical and contemporary perspectives to determine if they could also apply to individuals who serve as Ombuds. In conjunction with the results derived from the investigation of the validity of the concepts of impartiality and independence and informed by the views of practicing Ombuds, I identify how Ombuds should define their roles and the work they do as it relates to being 'independent and impartial'. Finally, I illustrate the various means used by Ombuds to determine whether or not the decisions they have reviewed have been made fairly, as well as investigate Ombuds' perceptions of how complainants and respondents determine if the Ombuds has acted fairly. In so doing, I will demonstrate the degree to which perceptions of fairness are interconnected (or not), with perceptions of Ombuds' independence and impartiality.

As the field of 'ombudsmanship' in its modern modality is just over forty years old in Canada (and North America) and as the role has mutated in a wide variety of ways from the first legislative model, there is very little definitive scholarship to draw from and to use for comparative purposes. In addition, the small amount of research done and the commentary published has focused primarily on the legislative Ombudsman role. However, as the growth in the field in Canada is in the public and private sectors through the establishment of organizational or hybrid Ombuds roles, this type of model is also well represented in this study.

This research analyzes the perceptions derived from 20 in-depth interviews with individuals who occupy Ombuds roles from all three models of practice. Further by taking into account the relevant case law as well as scholarly and popular literature related to Ombuds I reflect on the viability of the principles of independence and impartiality, and their

intersection with fairness in relation to the Ombuds role. In this dissertation I will argue that impartiality can only be explained and understood as aspirational, as human beings can not purge themselves of all their knowledge and experience that create negative or bad biases or predispositions, both known and unknown, thus colouring all that is seen and influencing all actions taken and conclusions reached or decisions taken. Simultaneously, it is also clear that there should not be any attempt to become a blank slate as the self-knowledge gained through introspection plus as much familiarity as is possible with the experiences of those that are different from our own is necessary for thinking and behaving as impartially as possible.

My primary objective is that this research will assist Ombuds practitioners in reflecting on how they conduct their work on a daily basis with complainants and respondents. It is also hoped that it will influence what is communicated to potential complainants and respondents about how Ombuds define their roles and the work they do, for example, through their presentations and promotional materials and media releases. At the same time, I hope that the research findings will inform governments as well as public and private sector organizations on the issues that need to be addressed when contemplating or establishing new Ombuds roles, and when these bodies are assessing the effectiveness of how current Ombuds roles have been configured. Finally, I hope that this research will assist 1) political scientists to determine if the Ombuds role, in its various configurations, can still be seen to be a tool for providing for administrative fairness and the resultant democratization of Canadian society that flows from 'good governance' and fair administration; 2) that legal scholars will better understand the specific nature of the Ombuds role and where it fits in the alternative dispute resolution (ADR) spectrum; and 3) will inform the expectations of complainants and respondents when interacting with

Ombuds. A potential side effect is that mediators, arbitrators, members of administrative tribunals and adjudicators may find this research useful for assessing their views and performance against the expectations delineated for Ombuds for independence, impartiality and their connection to fairness.

### **General Research Methodology**

As my intent was to gain an in-depth understanding of and provide an explanation for how the principles of independence, impartiality and collaterally, fairness, are conceptualized and implemented by Ombuds in Canada, I chose the route of primary research rather than relying only on secondary research to inform the generation of theory on these topics. In addition, while primary research is my preferred approach it is also a necessity, as only a small amount of empirical research has been done in Canada related to the theories underlying ombuds' practice and its impact. As a result, an additional ambition is to add to the emerging development of a theoretical vector as it relates to the existing database of Canadian Ombuds research.

My rationale for choosing a qualitative approach, rather than using a quantitative research methodology like a survey questionnaire, was determined by analyzing my ontological and epistemological positions according to the work on qualitative methods done by Jennifer Mason. My ontological position<sup>8</sup> is that becoming privy to the experience and knowledge that has influenced Ombuds' perspectives and interpretations is of great consequence to the principles or concepts I am exploring through this study. Secondly, my epistemological position<sup>9</sup> is that the best way to get useful data on concepts as fundamental and conversely, as ephemeral as impartiality, independence and their connection to fairness, is to hear from Ombuds' practitioners' own mouths, (and then

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<sup>8</sup> Jennifer Mason, *Qualitative Researching* (London: SAGE Publications Ltd., 2002) at 63.

<sup>9</sup> *Ibid.* at 64.

discuss with them) what they believe and why they believe it and how they demonstrate these beliefs in their practices.

I chose to pursue the method of comparative analysis as conceived by Glaser and Strauss<sup>10</sup> in order to discover or generate grounded theory as my primary research modality for a number of reasons. As defined by Michael Quinn Patton, grounded theory is "...theory that is inductively generated from fieldwork, that is, theory that emerges from the researcher's observations and interviews out in the real world, rather than in the laboratory or the academy".<sup>11</sup> This approach is appropriate given the depth and breadth of my experience as an Ombuds practitioner and resultant easy access to the 'real world' coupled with my desire to contribute to the demystification and provision of accurate and comprehensive information on both the theory and practice of Ombuds work. In the same vein I was also highly motivated to engage in a research process that would add value to those who practice as Ombuds and the individuals and communities who benefit from their services. Also, as Melanie Birks and Jane Mills who are experts in the use of grounded theory methodology have stated that one of the objectives and the outcomes of theory building which occurs through the use of this methodology is greater understanding of a particular phenomenon which "...will ultimately inform practice in a given discipline."<sup>12</sup> this method seemed ideal for my purposes. Reinforcement of the importance of this motivation was also articulated by Glaser and Strauss, the originators of this methodology, by stating "As the practical applicability of grounded theory research is the ultimate measure of its value, appraisal in this context is appropriate."<sup>13</sup> Hence, the potential for this method to be

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<sup>10</sup> Barney G. Glaser & Anselm L. Strauss, *The Discovery of Grounded Theory Strategies for Qualitative Research* (Chicago: Aldine Publishing Company, 1967) at 1.

<sup>11</sup> Michael Quinn Patton, *Qualitative Research & Evaluation Methods* (Thousand Oaks, California: Sage Publications, Inc., 2002) at 11.

<sup>12</sup> Melanie Birks & Jane Mills, *Grounded Theory A Practical Guide*, (London: SAGE Publications Ltd., 2011) at 154.

<sup>13</sup> *Ibid.* at 150.

beneficial to the Ombuds field as well as complainants, respondents and creators of Ombuds roles and the communities they serve, had a profound influence on my choice of this particular research methodology.

Secondly, as Tesch indicates in his graphical representation of various types of qualitative research that grounded theory flows from the “identification (and categorization) of elements, and exploration of their connections”<sup>14</sup>, it became apparent that this is an ideal approach for analyzing practitioners’ definitions of independence, impartiality and the exploration of the connection of these principles to perceptions of fairness. Thirdly, the generation of ‘grounded theory’ according to Glaser and Strauss requires sufficient theoretical sensitivity<sup>15</sup> on the part of the researcher to be comfortable with the theory emergence and development occurring *throughout* the research process. As I am both a practitioner and researcher, and perhaps as a result of personality as well, I am constantly assessing my reactions to behaviours and commentary as they relate to the principles under review. Similarly, given my actual immersion in the field of study and my varied exposure to different Ombuds roles, I have found that it is not possible for me to be dogmatic or doctrinaire about the concepts under review, as what seems logical to me one day or one year is buffeted by other points of view that emerge from the professional and scholarly literature as well as experiences and conversations had the following day or year. As a result, the notion of theories emerging from the data is very attractive to me as the viability of such activity is validated on a regular basis through daily practice and frequent discussion with colleagues.

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<sup>14</sup> Matthew B. Miles & A. Michael Huberman, *An Expanded Sourcebook Qualitative Data Analysis*, (Thousand Oaks, California: SAGE Publications Inc., 1994) at 7.

<sup>15</sup> Glaser & Strauss, *supra* note 10 at 46.

Fourthly, given the historical notion of grand theories resulting from the genius of individuals who posited "...“great-man” (sic) theories...",<sup>16</sup> I was intrigued by the notion of using this research to assess the viability of the grand theories imbedded in these widely acknowledged historically significant views: John Locke’s conception of impartiality flowing from indifference and structural independence<sup>17</sup> and the more modern belief that no human being is without bias regardless of how the role is established with respect to distance and independence. As Judge Frank said almost 70 years ago: “Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be a human being, and becomes a passionless thinking machine”.<sup>18</sup> Similarly, as the pursuit of grounded theory is dependent on continually assessing the resilience of great theories as the data accumulates, and Ombuds roles typically require constant analysis and reflection, this method seemed ideal for my purposes.<sup>19</sup>

Also, prior to settling on the path of generating ‘grounded theory’ through the use of interviews as my preferred research method, I considered the possibilities of participant observation and non-participant observation. However, due to the requirements of confidentiality and privacy in the work conducted by Ombuds, I determined that it would not be possible to engage in any form of participant observation or non-participant observation as it is normally conducted. An additional impediment is that observation of this type is typically conducted as an ‘outsider’ and I am clearly an ‘insider’ with respect to

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<sup>16</sup> *Ibid.* at 10.

<sup>17</sup> John Locke, *Two Treatises of Government* (1690) Source: York University Internet Archive online: <<http://archive.org/details/twotreatisesofg00lockuoft>> at 296.

<sup>18</sup> Jerome Frank in *J.P. Linahan Inc.*, 138 f.2D 650 (1943 – 2nd Cir) at p. 651. (p. 1).

<sup>19</sup> Glaser & Strauss, *supra* note 10 at 26.

my familiarity with every type of Ombuds practice as well as many of the individuals who currently occupy various Ombuds roles. Simultaneously, given my lengthy engagement with the Ombuds community having been active in the profession for 18 years, I am aware that this undertaking is somewhat akin to an 'autoethnography', given my commitment to reflective practice. It is the norm for me to analyze the manner in which I do my work as well as the work done by my colleagues in my current small office. In addition, I am also comparing and contrasting my current perspectives to my past beliefs, perceptions and actions accumulated from my experiences and observations in different Ombuds' settings in relation to the concepts under review. However, ultimately, I determined an autoethnography was too limiting an approach for the phenomenon under review as I believe there is so much more knowledge to be acquired from investigating other Ombuds' practitioners' perspectives. In the same trajectory of acknowledgment of the many modes of information gathering I engage in professionally, I recognize that I also engage in an informal form of participant observation in that I regularly attend Ombuds meetings, conferences and workshops and am privy to a wide variety of conversations and have observed many interactions between Ombuds who are discussing issues that are seminal to this research. However, I am not including the information garnered from these observations in my data set as they have not been collected in any systematic manner and as noted earlier, I am an insider in this context rather than having the requisite 'outsider' mentality. In addition, I would argue that it would be unethical for me to gather and report on information gathered in such a manner.

Finally, as the design of the constant comparative method has *not* been configured to ensure that different analysts will come up with identical results when reviewing the

same data, but rather is a disciplined medium which supports creativity,<sup>20</sup> I determined this approach was again ideal for my purposes for the following reason: I am constantly a witness to the fact that different individuals who are both well informed and well intentioned will come to very different and often valid conclusions when reviewing the same situation. As the mode of constant comparative activity recognizes the likelihood of various researchers' differing experiences and own beliefs and biases being influential, this approach is particularly well suited to a study that seeks to explore the concept of impartiality in particular. In an intriguing way this modality also replicates the daily experience of an Ombuds who is the continual repository of well-supported rationales for often diametrically opposed perceptions on the same situation.

As I recognize the impact of my experience in various professional roles within the Ombuds field is profound, in the interests of full disclosure, I am providing the following details of my work in this sector of ADR. Specifically, my entry to the practice of ombudsing began with the five years I served as Manager of Investigations/Complaint Resolution for a provincial Ombudsman, specifically an Ombudsman for Ontario (Roberta Jamieson), which is a legislative Ombuds role operating in the classical tradition, with its headquarters located in Toronto, Ontario.<sup>21</sup> Within that role I was responsible for the management of various teams engaged in both early resolution and investigative activities related to individual concerns as well as system-wide and systemic issues. I was also involved in the design and delivery of in-house training and education and in the presentation of information on the role and function of the Ontario Ombudsman to staff of

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<sup>20</sup> *Ibid.* at 103.

<sup>21</sup> When I was affiliated with this Office, there were also regional offices located in Thunder Bay, Sault Ste. Marie, London and Windsor. At the moment all staff are centralized in one Office located in Toronto, Ontario.



various Ontario government ministries and agencies. As a member of the management team, I was involved in discussions revolving around the restructuring and reorganization of the provision of services within the Ombudsman Ontario Office both prior to and when the funding of the office was decreased by 25% due to province-wide budget reductions which resulted in the staff complement moving from approximately 120 to 85 employees. I am including this level of detail as this external influence provided a significant opportunity to reflect on the concepts under review, particularly that of structural and personal independence.

Secondly, I designed and then fulfilled the role of Ombudsperson, as an external contractor, for Corporate Health Consultants (an employee assistance firm), in Mississauga, Ontario, for a one-year period only as the role was eliminated when the company was sold and the leadership of the organization changed. This role was based on the organizational model of practice. Once again, the impact of both external and internal influences in the elimination of this role furthered my thinking in relation to the principle of independence.

Thirdly, shortly thereafter I was recruited to design the role of Ombudsman for the Canadian Franchise Association, in Toronto, Ontario, which is a not-for-profit trade organization which exists to support franchisees and franchisors in the successful pursuit of their business endeavours. I fulfilled this role, based on the organizational model of practice, for four years as an external contractor. For a one-year period, at the same time, I served as the Ombudsman for the International Franchise Association, headquartered in Washington, D.C. that was also predicated on the organizational model of practice. Within these roles, in addition to handling complaints, I also made presentations on the role and

function of the Ombudsman to audiences of both franchisees and franchisors. I then resigned from these roles in order to pursue an LL.M. in Alternative Dispute Resolution at Osgoode Hall Law School. In addition, I currently serve as the Ombudsperson for Ryerson University in Toronto, Ontario and have done so for a twelve-year period, using the hybrid model of practice. As part of that role, I have made many presentations on the role and function of the Ombudsperson and lead many training sessions on effective conflict resolution, alternative modes of dispute resolution, effective communication, civility and fair decision-making processes as well as consulting on the development of a wide range of administrative and academic policies and procedures.

Over the past ten years, I have been active as a member of the Association of Canadian College and University Ombudspersons Association by serving on the Executive Committee for a two-year period; working on various committees, (one of which was tasked with drafting Standards of Practice for the academic Ombuds role) and planning, attending and making presentations at a multitude of workshops and conferences. In addition, I am a member of the Board of the Forum of Canadian Ombudsman, an umbrella organization including all types of Ombuds in its membership, and am completing my second two-year term. I have been active with this organization in the design and delivery of training programs on effective Ombuds work as well contributing to the improvement of internal and external communication strategies. More recently, I have been elected to serve as a member of the International Ombudsman Association Board of Directors to bring a hybrid Ombuds perspective to this Board whose focus is primarily organizational Ombuds. I am also an individual member of the International

Ombudsman Institute and am a regular recipient of material generated by this body that is populated by Ombuds established by legislation worldwide.

As I am mindful of the impact of my work in the Ombuds field and in keeping with the expectation of Marshall and Rossman regarding the pursuit of the generation of grounded theory, I have conceptualized myself as both reflective and active in the data generation process.<sup>22</sup> I am very aware that I am not a neutral collector and analyst of data and I have continually examined how my role as interviewer, Ombuds, conference presenter and doctoral student as well as my personal characteristics and social location affected the conduct of this research.

In summary, the primary methodological underpinning for this research is the production of grounded theory through the method of constant comparison. In addition, as a result of the approach taken and my academic influences, I have also engaged in a complementary mode of analysis, that being 'critical legal analysis' which involves scrutinizing the terms under study. The methodological details in terms of recruitment of interviewees, conduct of interviews, etc. are explained in-depth in Chapter 4, Detailed Methodology.

### **Road Map for the Dissertation**

In order to orient the reader to how the dissertation is laid out I am providing a brief summary of the contents of each chapter.

As the focus of the empirical research undertaken in this study is how those who occupy the role of Ombuds (or who serve as staff in Ombuds Offices), Chapter One serves as an in-depth orientation to how the Ombuds role is viewed and implemented in

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<sup>22</sup> Catherine Marshall & Gretchen B. Rossman, *Designing Qualitative Research* (Newbury Park, California: SAGE Publications, Inc., 1989) at 41 and 62.

Canada. Since there is a high degree of idiosyncrasy in how Ombuds roles have been established and implemented, I begin by illustrating differing points of view on the construction of this uniquely named role. I also provide precedents for this role to demonstrate how it was established in many different cultures and time periods so as to provide a full foundation for understanding this unique form of administrative justice.

Given the differing constructions of Canadian Ombuds' roles, in Chapter Two I provide a taxonomy detailing the three Ombuds models that I argue operate in Canada, specifically, the legislative, hybrid and organizational Ombuds. A detailed chronology of when and how the ten Ombuds of general jurisdiction (nine provincial and one territorial Ombuds) were established in Canada is provided at the outset followed by a brief summary of various examples of the hundreds of hybrid and organizational Ombuds roles in place as well. Using former Chief Justice Dickson's seminal description of the Ombuds role which decided a jurisdictional dispute in 1984 between the Ombudsman for British Columbia and a Crown Corporation created by the province, I detail the genesis and implementation of Ombuds mandates with respect to the following criteria: investigative authority; own motion/own initiative investigations; investigations resulting from an individual complaint; early resolution techniques; and accessibility as they relate to the three models of Ombuds-activity. The use of educational strategies for preventative purposes as well as the value of the power to recommend is also discussed. This chapter ends with the delineation of the fundamental characteristics of a Canadian Ombuds role whether it is established by legislation, policy, terms of reference, charter or executive fiat.

As independence and impartiality are the key principles that are examined empirically in this study, in Chapter Three the theoretical constructs for impartiality and independence are presented from both historical and contemporary perspectives. I also

use this opportunity to differentiate between the terms of 'neutrality' and 'impartiality' as they relate to the subject under discussion. As the principles of impartiality and independence have been examined extensively within the legal context through the lens of judicial decision-making, this chapter looks at the research results derived from five studies of judicial decision-making (four Canadian and one American) and one study of administrative tribunal decision-making (Canadian) as there is only a small amount of empirical research relating to Ombuds and independence in existence. This type of scholarship is both germane to and instructive to this study as while it is readily evident that judges and Ombuds are very different in that Ombuds do not make binding determinations, it will soon become apparent that these roles also share some common characteristics like the requirements for impartiality and independence and the capacity to make decisions (judges) or recommendations (Ombuds), which can have life changing impact. The current dominant modes used for the analysis of judicial decision-making, that is, attitudinal, legal and strategic, are referenced throughout. This material is key to understanding how the traditional theories of independence and impartiality have been found wanting in the assessment of decision-making for those theorists and practitioners who operate on the premise that a high degree of structural independence provides for impartiality. As I contend that the Ombuds role falls within the Alternative Dispute Resolution (ADR) area of the dispute resolution continuum, examples of how the key principles under review are now understood by ADR practitioners and scholars are also provided. The secondary research presented which includes the theories espoused by notable scholar/practitioners as they relate to impartiality and independence is essential to this undertaking as there have not been any studies undertaken that assess Ombuds' impartiality and independence in an empirical manner. As a result, I make use of these

research results along with the theories generated to illustrate the difficulty and complexity that Ombuds may also encounter in their efforts to act impartially and demonstrate independence. As there are those who argue that impartiality is in fact achievable I also present these approaches in order to provide a balanced view and when appropriate demonstrate the flaws inherent in their propositions. As researchers in the area of social psychology have delved deeply into what can be done to modify stereotypical thinking these data are also presented. Then the principle of independence is analyzed with respect to seminal Canadian case law and the importance of viewing independence and impartiality as separate concepts is also addressed. Finally, various means for addressing the challenges to impartiality and independence that have been articulated by major legal scholars is put forward for comparative purposes.

A detailed explanation of the research methodology used, that being, the generation of grounded theory, via the mode of constant comparison, as it relates to the conceptualization and implementation of the principles of independence and impartiality within the Canadian Ombuds role, is provided in Chapter Four. The strategies I used to recognize and limit my own bias, to the extent that it is possible to do so, are also discussed at this juncture.

The results of my examination of twenty Ombuds interviewees' perceptions of the constructs of independence and impartiality are delineated in Chapter Five followed by the articulation of the key practice points which emerged from these discussions. Specifically, ten strategies and techniques for increasing impartiality and seven examples of conditions and traditional role characteristics that can both contribute to and/or detract from independence, depending on the circumstances, are discussed.

As the concept of fairness is considered integral to the role of Ombuds and from a legal vantage point intersects with both impartiality and independence, in Chapter Six I present my analysis of the Ombuds interviewees' perspectives on whether, and if so, how, impartiality and independence are intertwined with complainants' and respondents' perceptions of fairness. In Chapter Seven, the primary conclusions that impartiality is always aspirational rather than achievable or impossible and that an independent mindset can be more influential than the traditional notions of structural independence are elucidated. Accordingly, the theories generated from my empirical research are also summarized at this juncture. To complete the circle, in this final chapter, I put forward a number of areas for further research that could benefit both the Ombuds field as well as the legal field generally that have emerged through the conduct of this study.

## **Chapter 1: Orientation to the Ombuds in Canada**

### **Introduction**

The Ombuds role in Canadian society contributes significantly to increasing access to justice by providing for administrative redress of various wrongs and unfairness in a timely, pluralistic and inexpensive manner. However, as the role is often inadequately or incorrectly portrayed in the media as well as in some academic and professional literature, there is considerable confusion about the Ombuds role. Given the ubiquity and the idiosyncrasy of this role in Canadian society, it is especially important to provide an accurate and comprehensive foundation as to its genesis and current status prior to inquiring into the foci of this study: impartiality and independence. I repeat, conflicting, incomplete, wrong and contradictory information abounds. Therefore, in an effort to increase clarity and reduce misconceptions, this introduction will serve as a comprehensive depiction and analysis of Ombuds roles as they emerged and now exist within all sectors of the Canadian landscape.

Given that the legal literature is scant in this area and since political scientists have devoted considerably more attention to the Ombuds institution due to its contribution to the democratization of society, the scholarship of political science is necessarily well represented in the exploration of what is a complex, multi-faceted and often misconstrued role both in academe and society generally. Similarly, as mainstream and specialized popular media also report frequently on the activities and reports of various Ombuds, this type of intelligence has also been explored to provide insight into the various representations provided of the Ombuds role in Canada. In addition, I have made use of the wide variety of Ombuds-generated reports to inform this analysis. Finally, as the research on Ombuds is often segregated in that researchers tend to focus exclusively on



one type of Ombuds role, which to date is primarily the legislative Ombuds, this research attempts to provide expression of the multiplicity of Ombuds roles established via policy or terms of reference, in public, private, governmental and not-for profit-sectors in Canada as well.

In order to provide a longitudinal context for this discussion as well as demonstrate how various precedents contribute to current constructions, I will firstly expand on the historical foundations for the role of Ombuds. Much of the legal and political science literature indicates that the Canadian Ombuds role is predicated on the original Swedish model when in fact it was first introduced in Canada replicating the New Zealand experience. Accordingly, I will demonstrate that the New Zealand statute was based on the Danish Ombuds model that was a mutation of the second iteration of the Swedish model of ombudsmanship. In addition, examples of the ombuds concept found in ancient societies well before any Swedish entity appointed its first Ombudsman are recognized as they offer useful antecedents to current practice as well. Secondly, I will delineate the current state of the continuing evolution of the various roles of Ombuds by observing the differences and similarities between what I consider to be the three primary models of practice, that is, 'classical, parliamentary or legislative'; 'hybrid' and 'organizational'. Thirdly, I will posit a normative definition for the role of an Ombuds in the Canadian context and offer a rationale for these essential defining characteristics and principles.

### Ombuds-what?

Prior to explaining how the Ombuds role came to be established in Canada and how it is currently defined, it is necessary to explain what it isn't. For example, anyone who follows media reports in Canada (and abroad) about Ombuds activity would likely be very confused as to what to expect when interacting with an Ombuds given the wide array of

descriptions found in media reports, academic texts, as well as Ombuds' generated literature. For example, in *The Metro*, a commuters' newspaper, it was reported that three sources from the National Hockey League (NHL) Players Association had indicated that they were disappointed in how a former player, Eric Lindros, was fulfilling his role as the ombudsman for the union.<sup>23</sup> The sources cited were particularly vexed that he was inaccessible and causing problems between the players and the association's Executive Director. It was noted that Mr. Lindros, as Ombudsman, was also expected to serve as a non-voting member of the executive board. This story continued to fascinate the sports media as Mr. Lindros resigned and was then replaced by Buzz Hargrove, former head of the Canadian Auto Workers. Subsequent reports then indicated that Mr. Hargrove had been ousted because of his role in orchestrating the equivalent of a palace coup<sup>24</sup> in arranging for the firing of the former Executive Director. Mr. Hargrove was quoted as saying he had resigned as he could no longer be effective as Ombudsman nor could he "...assist the leadership in building unity and solidarity that is necessary to move the NHLPA into the future".<sup>25</sup> This combination of activities is very far removed from how an ombuds role should be designed, and if the comments made are true, how it should be implemented in Canada.

Contemporaneously, in an article in a community newspaper in New Brunswick, reference is made to how difficult the first year had been for the then newly appointed 'Veterans Ombudsman', Patrick Stogran, due to the high volume of complaints and the inefficiency of the Veteran Affairs bureaucracy he encountered. It is then stated that:

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<sup>23</sup> Marty York, "Big Mysteries Surround Eric Lindros", *Metro* (31 December 2008), online: Metronews <<http://www.metronews.ca>>.

<sup>24</sup> Ken Campbell, "NHLPA votes to oust Hargrove, Pink, but can't make it official" *The Hockey News* (6 October 2009), online: The Hockey News <<http://the.hockeynews.com>>.

<sup>25</sup> Brandon Hicks, "Hargrove Resigns from NHLPA" *CBC Sports* (8 November 2009), online: CBC Sports <<http://cbc.ca/sports>>.

"Stogran says he's neither impartial nor neutral as the veterans' ombudsman. He's there to serve the veterans, period".<sup>26</sup> Perhaps Mr. Stogran was misquoted, as in direct opposition to the comments attributed to this Ombudsman, the Veterans Affairs Canada proclamation states: "Announced on April 3, 2007, the Veterans Ombudsman is an **impartial**, arms-length and independent officer with the responsibility to assist Veterans to pursue their concerns and advance their issues".<sup>27</sup> Given that the role is described as independent and impartial, the Ombudsman would only be in a position to 'assist Veterans to advance their concerns' if he had determined they were valid. However, if the attribution credited to Stogran is correct it would seem his role should be more correctly termed as 'Veterans' Advocate'.

In direct contrast to the previously cited depictions of two very different Ombuds' roles, a news report in the *Investment Executive*, a trade magazine, described the first year of operations for the Canadian Taxpayers' Ombudsman, Mr. Paul Dubé. He is quoted as stating: "I am independent and impartial, so I meet both sides of the equation....I think it is important for me to talk to the Canada Revenue Agency (CRA) employees to see how the systems are set up, see what kinds of challenges they face".<sup>28</sup> This comment was prefaced by his stated intention to visit CRA offices across the country so as to understand the problems encountered by employees in providing service in addition to those brought to his attention by the 3000 individuals and small and medium sized business owners who were complaining about the CRA service. Fortunately, for the readers of *The Investment*

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<sup>26</sup> "Veterans' ombudsman ends first year with a backlog of complaints" *The Daily Gleaner* (7 November 2008), online: Daily Gleaner.com <<http://dailygleaner.canadaeast.com/canadaworld/article/43784>>.

<sup>27</sup> "Veterans Ombudsman Introduction"(2007) online: Veteran Affairs Canada <<http://www.veterans.gc.ca/eng/ombudsman>>. The bolding of 'impartial' is my emphasis.

<sup>28</sup> Megan Harman, "Tax ombudsman ramps up complaint-handling capacity", *The Investment Executive* (16 December 2008), online: <<http://www.investmentexecutive.com>>.

*Executive*, this portrayal of the role of the Taxpayers' Ombudsman is consistent both with the published terms of reference and the historical foundations of the Ombuds role.

Unfortunately, not only do the news media provide widely divergent accounts of what an Ombuds does and should do, a similar divergence of views of how the role of an Ombuds should be designed and fulfilled also exists in the scholarly literature. For example, in Macfarlane's text book entitled *Dispute Resolution Readings and Case Studies* which is used for ADR classes in law schools, universities and colleges across the country, the Ombuds role is defined as: "The ombudsman is the quintessential neutral evaluator".<sup>29</sup> This definition is problematic as many Ombuds (as well as jurists and other dispute resolution practitioners) would consider the use of the term 'neutral' to be incorrect as an Ombuds should not be seen to be 'neutral' when fairness principles, such as lack of notice that an important decision will be made and/or the opportunity to know the case against you and respond, or a biased decision-maker, are violated. Further, some scholars and practitioners, for instance (Astor (2007), Cain (1997-1998), L'Heureux-Dubé (1997), MacMillan (1938), McLachlin (1997) Mulcahy (2001) Resnik (1997-1998), would discount the possibility of a neutral human being entirely, regardless of the stated requirements of the position occupied. In addition, as is evident from the annual reports of all manner of Ombuds and from my own observation and experience, the vast majority of complaints handled by Ombuds of all varieties are resolved via mutual agreement without an evaluation of the merits of the complaints being conducted by the Ombuds. These three indicia alone demonstrate why the definition of 'quintessential neutral evaluator' in this widely used textbook requires adjustment and amplification.

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<sup>29</sup> Julie Macfarlane, ed., *Dispute Resolution – Readings and Case Studies, Second Edition* (Toronto: Emond Montgomery Publications, 2003) at 594.

As the role of Ombuds is typically situated in the administrative law section of legal reference texts, I looked to Van Harten et al's *Administrative Law Cases, Texts, and Materials* for its definition and analysis of the Ombuds role. In this mammoth edition of almost 1400 pages, released for the sixth time in 2010, there are two paragraphs dedicated to the role of Ombuds and the definition provided appears to be focused solely on provincial Ombuds established by legislation.<sup>30</sup> The authors indicate that an Ombudsman (the authors' term) has five powers and functions, beginning with 1) the ability to investigate governmental administrative actions; and 2) the authority to acquire the information needed for the investigation. In addition, in the description of the Ombudsman's second power, collateral reference is made to gathering information in private. Given how important it may be to the complainant for an inquiry or an investigation to be undertaken anonymously or in private, I would suggest that the Ombuds' ability to maintain the complainant's confidentiality and hold her own records in confidence, should also be recognized as a stand-alone essential power, thereby bringing the total number of powers and functions posited in this context to six. The additional three criteria posited by Van Harten et al include: 3) that the filing of a complaint is easily done and free of financial cost; 4) the Ombuds has wide latitude as to how to describe what a government has done wrong; and finally, 5) (or the sixth power identified) that the Ombuds can ask for redress appropriate to the wrong identified, but since he has no legal basis for binding the wrong doer, his recommendations are only enforceable via political or public pressure.<sup>31</sup> However, I would argue that while external pressure can be used, frequently none is necessary when an Ombuds presents feasible and reasonable recommendations

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<sup>30</sup> There are two factual errors in this description in that it indicates that: 1) all Canadian provinces have an Ombudsman role in place when in fact Prince Edward Island has not yet established an Ombudsman of general jurisdiction; 2) the Yukon Territory Ombudsman is not included even though it has been in place since 1996.

<sup>31</sup> Gus Van Harten, Gerald Heckman, David J. Mullan, *Administrative Law Cases, Text, and Materials* 6<sup>th</sup> ed. (Toronto: Emond Montgomery Publications, 2010) at 22.

based on compelling conclusions derived from a thorough review of an issue(s). Stanley Anderson, noted American Ombudsman scholar, who wrote extensively on Canadian ombuds roles has taken another tack and opined that it is the 'prestige' of an Ombuds that allows for his 'suggestions' (Anderson's term) to be accepted and implemented.<sup>32</sup> In the same vein, noted British Ombuds scholar, Mary Seneviratne, observes that the inability to enforce recommendations is irrelevant as respondents typically accept them given the respect that is accorded to the Office.<sup>33</sup> As a result, the lack of enforcement inherent in the Ombuds role is not necessarily an impediment to the promise and delivery of administrative fairness if the recommendations made are based on a credible review process. It is also surprising that no reference is made to either 'impartial' or 'independent' in Van Harten et al's description of the Ombuds powers and functions. Perhaps, though, these characteristics are considered implicit to an investigative body of this nature and therefore are not included as descriptors.

It is noteworthy that Van Harten et al only make reference to provincial Ombudsman<sup>34</sup> (as well as recognizing the Newfoundland and Labrador Citizen's Representative and the Québec Protecteur des Citoyens as members of this group) in their preamble to laying out the defining characteristics of an Ombudsman that investigates the fairness of governmental administrative actions. The emphasis on provincial Ombuds is intriguing as there are a number of other roles specifically named as 'Ombudsman' as well that have also been established by legislation, but at federal and municipal levels. For instance, the federal Public Procurement Ombudsman and the

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<sup>32</sup> Stanley V. Anderson, *Canadian Ombudsman Proposals*, (Berkeley, California: Institute of Governmental Studies, University of California, 1966) at ix.

<sup>33</sup> Mary Seneviratne, *Ombudsmen Public Services and Administrative Justice* (U.K.: Butterworths Lexis Nexis, 2002) at 54.

<sup>34</sup> An Ombudsman for the Yukon Territory has also been in existence since 1996. Also, only nine provinces have established Ombuds roles to date, with Prince Edward Island being the exception.

Correctional Investigator (often referred to as the federal Prison Ombudsman) are also established by statute, and at least two municipal Ombudsman (for the Cities of Montréal and Toronto) have been established via by-laws which are underpinned by provincial statute, and they also enjoy all of the six powers and functions attributed to the aforementioned provincial Ombudsman but are not included or identified. While not created by statute, the previously noted Veterans' Ombudsman and Taxpayers' Ombudsman, which have been established by Order-in-Council, also enjoy the six powers cited above. In addition, various federal Ombuds roles have been established by departmental policy, terms of reference or Charter. Some examples include the National Defence and Canadian Forces Ombudsman, Passport Canada, Parks Canada and National Capital Commission.<sup>35</sup> Similarly, as there are many Ombuds roles established within the private, public and not-for-profit sectors which also have the same powers and functions as they relate to the administration of an organization or institution or private company, but are not statutorily established, it would be interesting to know if the authors' intent is to indicate that only provincial and by logical extension, territorial and municipal Ombuds' roles of general jurisdiction established by legislation actually qualify as Ombuds.

In addition, Van Harten et al's description also prompts the reader to contemplate whether they believe that those Officers of the Legislature whose roles have been established via statute to investigate the implementation of specific pieces of legislation, (e.g. Privacy and Language Commissioners), also fall outside the definition of an Ombuds. Interestingly enough, the current federal Privacy Commissioner, Jennifer Stoddart,

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<sup>35</sup> Please see descriptions of each of these roles and their terms of reference at the following locations: "About Us" (April 17, 2009), online: National Defence and Canadian Forces Ombudsman online: <<http://www.ombudsman.forces.gc.ca>>; "The Ombudsman" (19 February 2009), online: Passport Canada <<http://www.ppt.gc.ca>>; "Code of Ethics, Chapter 4: Avenues of Resolution, Resolution of Ethical Dilemmas" (15 April 2009) online: Parks Canada <<http://www.pc.gc.ca>>; "Ombudsman NCC/CCN" (3 April 2009), online: National Capital Commission <<http://ombudsman.ncc-ccn.ca>>; online: Health Canada <<http://www.hc-sc.gc.ca/ahc-asc/branch-dirigen/paccb-dgapcc/omb/index-eng.php>>.

identifies the Privacy Commissioner's role as being based on the Ombuds model of dispute resolution<sup>36</sup> as did her predecessor Bruce Phillips. Phillips defended and promoted the use of the Ombuds model when the protection of personal information was extended into the private sector via the introduction of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*.<sup>37</sup> It is also instructive that Lorne Sossin and France Houle were given a specific research mandate to assess the effectiveness of the Ombuds model as it applies to *PIPEDA*. Interestingly, in Sossin and Houle's 2010 report, situated in the preamble to their findings, the following general characteristics for an Ombuds were posited as background information:

- Advancing goals of fairness, transparency, accountability, and equity;
- Committed to pursuing mutually agreeable and/or consensual resolution of disputes;
- Flexibility;
- Confidentiality;
- Independence from government;
- Authority to conduct investigations;
- Authority to issue public reports; and
- The absence of binding orders, remedial sanctions or disciplinary powers.<sup>38</sup>

In reviewing the characteristics of Ombuds as delineated by all of the aforementioned legal scholars, it is startling to me that only independence and not impartiality is required by Sossin and Houle in their defining characteristics, given the import that is normally ascribed to both of these characteristics for fairness purposes. However, I suspect that this omission is explained by the fact these two criteria are considered implicit to the role given the usual legislative underpinnings for Ombuds.

Typically, provincial and territorial and some federal Ombuds provide for a very high

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<sup>36</sup> Jennifer Stoddart, "Cherry Picking Among Apples and Oranges: Refocusing Current Debate About the Merits of the Ombuds-Model Under PIPEDA" (21 October 2005) online: Office of the Privacy Commissioner of Canada <<http://www.priv.gc.ca>> at 3.

<sup>37</sup> Lorne Sossin and France Houle, "Powers and Functions of the Ombudsman in the Personal Information Protection and Electronic Documents Act An Effectiveness Study Part II: Approaches and Alternatives in evaluating the Privacy Commissioner's PIPEDA jurisdiction" online: Office of the Privacy Commissioner of Canada <<http://www.priv.gc.ca/>> at 120.

<sup>38</sup> *Ibid.* at 117.



degree of structural independence and stipulate an impartial approach. Also, shortly after setting out the features characteristic to the Ombuds model, Sossin and Houle indicate that the Ombuds' investigative approach is impartial as well as fast and informal.<sup>39</sup>

Next, in order to provide a means for understanding how the Ombuds role has evolved in an environment that is largely self defined and unregulated, I will attempt to articulate the development and construction of the broad spectrum of Ombuds activity extant in Canada. It will soon become apparent that familiarity with this circuitous route is essential to appreciating the many current manifestations and constructions of the Ombuds role.

#### The Ombuds Foundation

At this juncture it is important to draw attention to the fact that the multiple models of ombudsing established within the public, private and not-for-profit sectors in Canada, which have been growing in number<sup>40</sup> and diversity, since the 1960s and 70s, have evolved serendipitously rather than by design. Not surprisingly, the current implementation of Ombuds roles and functions in Canada are illustrative of the winding developmental paths of this alternative mode of dispute resolution. Specifically, as there is no federal Ombuds of general jurisdiction nor regulatory nor professional body in place in Canada to specify how an Ombuds should be created or what model it should follow, the type of Ombuds role established and the nature of its inquisitorial powers is dependent entirely upon what entity established it, its vision for how oversight for the purpose of administrative fairness should be fulfilled and by whom, as well as which political and/or personal philosophies have influenced the entity's thinking. This reality has important

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<sup>39</sup> *Ibid.* at 119.

<sup>40</sup> Frank Stacey, *Ombudsmen Compared* (Oxford: Clarendon Press, 1978) at 51. Stacey observed in his world wide study of Ombuds roles published in 1978 that in North America, Canadian jurisdictions had demonstrated the greatest zeal for establishing Ombuds offices overall.

implications for the implementation of the principles of independence and impartiality. It is noteworthy that the opposite approach was taken in New Zealand where the *Ombudsmen Act* 1975 (N.Z.), 1975/9 (28A s. 1)<sup>41</sup> protects the use of the term of 'Ombudsman' by requiring consent in writing from the Chief Ombudsman in advance of any non-governmental Ombudsman service being established in that jurisdiction.<sup>42</sup> In addition, in an effort to prevent the misuse of the Ombudsman name the Australian and New Zealand Ombudsman Association (ANOZA) have set out six required criteria for the use of this term or title. Their specifications include structural independence; general jurisdiction for all administrative actions; strong powers of investigation, including ability to undertake investigations on the Ombuds' own initiative and determine own procedures; accessibility; procedural fairness in how the Ombuds work is accomplished; and accountability.<sup>43</sup> The New Zealand reference is particularly relevant to this discussion, as noted earlier, in that the first Canadian Ombuds roles established by legislation were strongly influenced by the Ombuds regime as it was created by that country in 1962. It is also worthy of mention that New Zealand was the first common law country government to create an Ombudsman and it did so following the Danish Ombudsman model of operation.<sup>44</sup> This decision is significant with respect to the shape of the Canadian Ombuds role as the Danish model does not include judicial oversight and any form of prosecutorial powers which were elemental to the more frequently referenced Swedish model.<sup>45</sup>

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<sup>41</sup> *Ombudsmen Act* 1975 No 9 Section 28A 'Protection of name' <<http://www.legislation.govt.nz>>.

<sup>42</sup> *Ibid.* Section (1).

<sup>43</sup> The Australian and New Zealand Ombudsman Association (ANZOA) "Essential Criteria for Describing A Body As An Ombudsman" ANZOA Policy Statement, February 2010. Online: ANZOA <<http://www.anzoa.com.au>>.

<sup>44</sup> Severatine, *supra* note 33 at 15.

<sup>45</sup> Ulf Lundvik, *The Ombudsmen in the Provinces of Canada*, (Edmonton: International Ombudsman Institute, 1981) at 5.

Canadian 'early adopters' of the Ombuds concept were exposed to the New Zealand experience when Sir Guy Powles, the first New Zealand Ombudsman, visited Canada in 1964 to speak at the annual general meeting of the Canadian Bar Association (CBA). This speech resulted in the CBA recommending the Ombuds role be studied for application in provincial and federal jurisdictions.<sup>46</sup> As well, a political scientist, Karl Friedmann, who became the first Ombudsman for British Columbia, described the New Zealand Ombuds legislation as "...a nearly perfect statute".<sup>47</sup> However, interestingly enough, two years prior to the establishment of any Ombuds role in Canada by legislation, in 1965, an Ombudsman was established, (in fact, according to some sources, the first academic Ombuds role in North America), at Simon Fraser University in Vancouver by the Students' Association.<sup>48</sup> This inaugural role continues today with joint funding from two Students' Associations and the University and is likely the first instance of the meandering approach to the establishment of Ombuds roles in Canada.

Taking a longer view of history, in order to demonstrate that the Ombuds role existed prior to the often referenced Swedish model created in 1809, Stephen Owen<sup>49</sup>, who was previously the Ombudsman for the province of British Columbia, began his

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<sup>46</sup> Karl Friedmann, Proceedings of the Conference on Ombudsman "Let Justice Be seen To be Done" (Vancouver: British Columbia Human Rights Council, March 1970) at 10.

<sup>47</sup> *Ibid.*

<sup>48</sup> This information was presented verbally and supported by copies of printed documentation by Laurine Harrison (now deceased), former Ombudsperson at Simon Fraser University (SFU) at a mid-year meeting of the Association of Canadian College and University Ombudsperson 2001 at Wilfrid Laurier University in Waterloo, Ontario. In 2012, the website for the current Simon Fraser University Ombudsperson indicates that the office has been in place for "...over forty years." Source: "Office of the Ombudsperson" Simon Fraser University online: <[www.sfu.ca](http://www.sfu.ca)>.

Interestingly enough, this information is contradicted by reference made in the obituary of the former first Principal of Concordia University, John O'Brien where Mr. O'Brien was credited for having established the first Ombudsman role in a university in North America at Concordia University in Montreal. Unfortunately no specific date for the office being put in place is provided. Source: Philip Fine, "Administrator Negotiated merger that created Concordia University" (24 January 2012) *The Globe and Mail* online: <<http://vl.globeandmail.com>>. Ultimately, it may be that both institutions are accurate in their claim of 'first Ombudsman' in that SFU was likely the first Ombudsman role established within a Canadian university solely by a student association and Concordia is likely the first University to have directed the establishment of an Ombuds of general jurisdiction for the institution as a whole.

<sup>49</sup> Mr. Owen was also a Deputy Minister and Deputy Attorney-General for BC, a professor of Dispute Resolution at the University of Victoria, and a federal Member of Parliament and a Cabinet Minister. Most recently he was the Vice-President, External, Legal and Community Relations for the University of British Columbia.

historical account of the world-wide establishment of the Ombuds role with reference to the Control Yuan of ancient China and the Roman tribune.<sup>50</sup> In contrast, Paul Murray, a Research Officer with the Ontario legislature, started his historical analysis with earlier examples taken from Caiden et al who produced a comparative study on the establishment of Ombuds roles worldwide.<sup>51</sup> For example, Murray included the kings of ancient Egypt who provided for complaints officers to be attached to their courts; using a comparable arrangement, the Roman Republic arranged for the appointment of two censors to analyze administrative activity and to handle complaints about maladministration.<sup>52</sup> Murray also recognized the Han Dynasty and the similar role played by the Control Yuan as identified by Stephen Owen. In addition, he noted that rulers in the Middle Ages arranged for civilian oversight of the activity of public officials.

Emily Gill, in her analysis of the evolution of the Ombuds role described the aforementioned Roman role as a '*tribunis plebis*' that served as a protector of the lower class against the patricians as a potential Ombudsman antecedent. This tribune could veto the decisions of consuls, magistrates or senators and anyone who did not accept the veto could be sanctioned severely. As a result, Gill opined that 'the tribune' is the precursor of the current role of Ombuds as it was an important means for ensuring the 'powerless' in Roman society were not subjected to arbitrary decision-making that did not show respect for tradition.<sup>53</sup> However, as it must be acknowledged that Ombuds typically do not have veto authority or the ability to mete out sanctions or punishments, I would argue that the 'tribune' reference is not necessarily applicable to the Ombuds role in Canada. Gill also

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<sup>50</sup> Stephen Owen, "Essential Elements & Common Challenges" *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (Cambridge, Massachusetts: Kluwer Law International, 1999) at 52.

<sup>51</sup> See *International Handbook of the Ombudsman* (Connecticut: Greenwood Press, 1983) edited by Gerald E. Caiden.

<sup>52</sup> Paul Murray, "The Ombudsman: Historical Development, Different Models and Common Problems", (1994) Current Issue Paper 153. (Toronto: Legislative Research Service, Ontario Legislative Library) at 2.

<sup>53</sup> Emily R. Gill, *The Civil Ombudsman and the American Scene* (Ph.D. Thesis, Claremont Graduate School, 1971) at 5.

provided examples of other means for balancing power by observing that in Europe in the middle ages, on occasion, the Christian Church would intercede between a subject who felt oppressed and the relevant ruler, and that in Norman times in England the Court of the Exchequer served as a means for redressing government malfeasance.<sup>54</sup>

C. McKenna Lang excavated the historical roots somewhat differently in her attempt to demonstrate the cultural diversity inherent in the origins of the role of Ombuds. For example, Lang begins her historical analysis by identifying a number of simple mechanisms established for airing grievances like the 'lung stone',<sup>55</sup> found in China in the third or fourth century. People stood on this stone to air their criticisms of the government publicly if the person, who was responsible to receive them, that being the 'headman', did not accept them and transmit them to the proper authority. 'Gentlemen' who happened to be in the area of the lung stone and heard these complaints were then required to report them to the Emperor and the recalcitrant 'headman' would be held accountable for not bringing them forward himself. Another evocative image from the fifth century in China is what was described as the 'vilification tree'.<sup>56</sup> In this modality, individuals would attach their written complaint to the appointed tree so it could be read by the ruler. The only Empress of the time was said to have expanded the options available to provide for the use of locked metal complaint boxes outfitted with slots that allowed for complainants to submit their grievances on paper privately.<sup>57</sup> These boxes could be found in close proximity to the vilification tree resulting in easy access, for those who were literate, to both a private and public means for submitting a concern. Apparently these modalities were thought to have

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<sup>54</sup> *Ibid.* at 6.

<sup>55</sup> C. McKenna Lang, "The Origins of Ombudsing: A History of Diversity" (M.A. Antioch University Seattle, 2008) [unpublished] at 10.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

contributed greatly to the Empress' positive reputation as a ruler as by using these sources of information she became more knowledgeable about the citizenry's concerns.<sup>58</sup> Lang also singled out the Chinese 'Censorate' (which others refer to as the Central or Control Yuan) which by the twelfth century had investigative powers and the ability to look at complaints in confidence as well as the previously mentioned Roman tribune, as prototypes for the current Ombuds role as they were much more sophisticated mechanisms for investigating and overseeing governmental bureaucracies.<sup>59</sup> However, I would posit that the aforementioned 'lung stone' which was used to hold the 'headman' accountable for not doing his job properly should also be considered as a viable precedent for the Ombuds role. This acknowledgement is appropriate given that many individuals who bring complaints forward to Ombuds indicate that their primary rationale for doing so is to be 'heard' as their experience is that no one who actually had responsibility to do so has actually been willing to listen to their concerns. In addition, as many complaints brought forward to an Ombuds are resolved only through an informal discussion with the complainant and/or the respondent, without any in-depth investigative activity being undertaken, the principle behind the 'lung stone' and the 'gentleman' carrying the message forward is replicated every day in all manner of Ombuds' offices. Similarly, the motif of the 'locked box' has been readily assimilated into the Ombuds' current authority to receive written complaints in confidence whether they are submitted by incarcerated inmates in sealed envelopes, unread by prison authorities, or electronically via email from citizens or employees, via an Ombuds' secure website. In addition, some provincial Ombuds, for instance, the Ombudsman for Saskatchewan, was also recently named as the appropriate recipient for complaints made by government employees through the enactment of 'whistle

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.* at 14.

blowing' legislation. In this instance, *The Public Interest Disclosure Act*, provides the means for the Saskatchewan provincial employees to disclose concerns about government wrong doing without fear of reprisal.<sup>60</sup>

The City of Toronto Ombudsman proffers another example as a precursor to the modern Ombuds role by indicating that First Nations in Canada had well-established means for mediating disputes between decision-makers and individuals.<sup>61</sup> Another example of a society having established a prototype of the Ombuds role many centuries ago is that which is known within the Muslim faith as 'Mohtasib'. According to Duhaime, originally this position was identified as fulfilling both a prosecutorial and policing role.<sup>62</sup> However, other historical accounts suggest otherwise by the following description:

Out of your hours of work fix a time for complaints and for those who want to approach you with their grievances. For this purpose you must arrange public audience for them, and during this audience, for the sake of God, treat them with kindness, courtesy and respect. Do not let your army and police be in the audience hall at such a time so that those who have grievances against your government may speak to you freely, unreservedly and without fear. All this is a necessary factor for your rule because I have often heard the Prophet (Peace of God be upon him) saying: "that nation or government cannot achieve salvation where the rights of the depressed, destitute and suppressed are not guarded, and where mighty and powerful persons are not forced to accede to these rights."<sup>63</sup>

Another view is that this concept is based on the term of 'Hisba' and is defined as accountability to self and others and was created by Omer, Second Caliph of Islam. The person in this role was expected to travel to both urban areas and market places in medieval times to intervene between customers and sellers when cheating was suspected as well as to address dishonest behaviour on the part of public officials.<sup>64</sup> Both, the term

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<sup>60</sup> Government of Saskatchewan, News Release, "ACTING PUBLIC INTEREST DISCLOSURE COMMISSIONER APPOINTED" (9 February 2012) online: Government of Saskatchewan <<http://www.gov.sk.ca>>.

<sup>61</sup> "History of the Ombudsman" online: City of Toronto Ombudsman <<http://ombudstoronto.ca>>.

<sup>62</sup> Legal Dictionary Duhaime Law online: <<http://www.duhaime.org/LegalDictionary/M/Mohtasib.aspx>>.

<sup>63</sup> S.A. Bokhari, "Ombudsman: An Introduction" online: International Policy Fellowship <[http://www.policy.hu/bokhari/ombud\\_intro.html](http://www.policy.hu/bokhari/ombud_intro.html)> at 2.

<sup>64</sup> *Ibid.* at 1.

and the concept live on in Pakistan, in particular, where the federal Ombudsman of general jurisdiction and provincial Ombudsman roles and banking Ombudsman roles are known as 'Mohtasib'.<sup>65</sup>

The 'justiceombudsman' (JO) established by the Riksdagen (the Swedish parliament) in 1809 is frequently noted as the 'first' Ombudsman in many articles written about Ombuds in academic journals or in organizational newsletters and reports. In fact, Nathalie Des Rosiers observed that "...most scholars point to Sweden as the place where the modern Ombudsman had its roots".<sup>66</sup> However, as noted earlier, the Swedish model is very different from the Canadian model. Geoffrey Sawyer, Australian Ombudsman scholar, has indicated that the English translation of the JO is 'Procurator for Civil Affairs' and this role provided not only for the ability to address criminal matters but also to initiate prosecutions of public officials.<sup>67</sup> However, Ulf Lundvik, a former Chief Parliamentary Ombudsman for Sweden, indicates that, in practice though, the JO's function was actually only to take action against public officials who had neglected their duties or committed illegal acts.<sup>68</sup> Lundvik's assessment is supported by Lang who concurs with the view that the primary purpose of the role is to address complaints about public officials.<sup>69</sup>

For the sake of clarity from a current perspective I will provide a brief summary of the manner in which the Office of the Swedish Ombudsman is now organized as portrayed by the current Ombudsmen themselves. There are now four Swedish Parliamentary Ombudsmen who are elected by Parliament. The roles are defined and differentiated in the following manner: the **Chief Ombudsman** provides general direction for the Office as

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<sup>65</sup> Wafaqi Mohtasib(Ombudsman) of Pakistan online: <<http://www.mohtasib.gov.pk>> and /Ombudsman's (Mhotasib) Schemes An Introduction" Banking Mhotasib Pakistan online: <<http://www.bankingmohtasib.gov.pk>>.

<sup>66</sup> des Rosiers, *supra* note 3 at 1.

<sup>67</sup> Geoffrey Sawyer, *Ombudsmen* (Melbourne, Melbourne University Press, 1968), at 7.

<sup>68</sup> Lundvik, *supra* note 45 at 1.

<sup>69</sup> C. McKenna Lang, *supra* note 55 at 37.



well as oversight of the National Defence force, prisons, probation officials, the National Health Service, etc. but can not interfere with the opinions of the three other Ombudsmen who have their own specific areas of jurisdiction. Respectively, **Ombudsman 2** has responsibility for oversight of public prosecutors, police, customs officials, National Arts Centre, public service employees. **Ombudsman 3**: a.k.a. the Children's Ombudsman, is also responsible for social services generally, health and medical services, and education. The jurisdiction of **Ombudsman 4** includes courts of law, tribunals, legal aid, guardianship, etc.<sup>70</sup> While the occupants of these four roles have the power to initiate prosecutions of public officials who are charged with criminal acts,<sup>71</sup> they rarely do so and tend to operate more in an advisory and consultative manner<sup>72</sup> or issue what is an 'admonition' which has no binding effect on its recipient but can be circulated publicly. These four individuals have the authority to visit all manner of public facilities for inspection purposes and assess their operations. This authority also includes inspection of district courts and county administrative courts.<sup>73</sup>

In contrast to the current Swedish Ombudsman construction, it is also useful to know that an earlier version of the Ombuds role and a precursor to the JO was appointed to act in the role entitled 'Supreme Ombudsman' in Sweden in 1713 almost two hundred years earlier.<sup>74</sup> This Officer who was responsible for ensuring the government was operating properly in the King's absence was *not* established by legislation and reported to the King directly. Therefore, this configuration could be more accurately described, in modern parlance, as an example of the first 'hybrid' or 'organizational' Ombudsman,

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<sup>70</sup> "The Ombudsmen" online: The Parliamentary Ombudsmen <<http://www.jo.se>>.

<sup>71</sup> "Powers and Sanctions" online: The Parliamentary Ombudsmen <<http://www.jo.se>>.

<sup>72</sup> "History" online: The Parliamentary Ombudsmen <<http://www.jo.se>>.

<sup>73</sup> "Inspections" online: The Parliamentary Ombudsmen <<http://www.jo.se>>

<sup>74</sup> Peter Haskins, *The Ombudsman: An Approach for the Layman: A Survey and Discussion* (Ottawa: Public Service Commission, 1966) at 4.

depending on the powers provided to that Ombudsman. Another view of how the first Ombudsman role came to be established in Sweden in 1713 was provided in an October 2008 interview with Olli Rehn, the Member of the European Commission responsible for Enlargement. Mr. Rehn indicated that the Ombudsman institution was actually created by the Ottoman empire and was brought to Sweden by King Charles after he spent time in Turkey.<sup>75</sup> This may have been the 'Mohtasib' role referenced earlier.

Apparently the Ombuds role lay fallow in Scandinavia, outside of Sweden, until 1919 when Finland established a parliamentary Ombudsman after gaining its independence from Russia.<sup>76</sup> Then, in 1954 the Danish ombudsman was established by Folketing (the Parliament of Denmark) and the highly respected Professor of Law, Stephan Hurwitz was elected to the position in 1955.<sup>77</sup> Subsequently, the Norwegian government added an Ombudsman for reviewing public administration in 1962, based on the Danish model of operation, after having established an Ombudsman for military matters in 1952.<sup>78</sup> Of considerable import to Canada is the fact that in 1962, as observed earlier, the first common law country to establish an Ombudsman was the government of New Zealand and it did so following the Danish model of operation as opposed to following the Swedish model established in 1809.<sup>79</sup> It is opined by Lundvik that interest in Canada in the Ombuds' concept was stimulated by two political scientists, namely Hugh Thorburn of Queen's University and Donald C. Rowat of Carleton University who said they became aware of the Ombuds concept by following discussions about the possible creation of the

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<sup>75</sup> Interview of Dr. Olli Rehn by Selçuk Grtař (18 October 2008) online: Today's Zaman <<http://www.todayszaman.com>>.

<sup>76</sup> Gill, *supra*, note 53 at 29.

<sup>77</sup> Stacey, *supra* note 40 at 18.

<sup>78</sup> *Ibid.* at 32.

<sup>79</sup> Lundvik, *supra* note 45 at 5.

role in Britain.<sup>80</sup> Rowat continued his engagement with the Ombuds role by providing commentary on its proper construction and served as a life long advocate for the benefit of legislatively based Ombuds roles, particularly a federal Ombudsman of general jurisdiction, in Canada until his death in 2009.

As noted earlier, in 1964, Sir Guy Powles, the first New Zealand Ombudsman, in addition to speaking to the CBA which resulted in that organization recommending the Ombuds role be studied for application in provincial and federal jurisdictions, also spoke to the Canadian Parliamentary 'Standing committee of Privileges and Elections' known as the Moreau Committee.<sup>81</sup> Rowat and the Auditor-General at the time also spoke to the Committee and in 1965 the Moreau Committee recommended the establishment of a federal Ombudsman of general jurisdiction. In response, in the next Throne Speech then Prime Minister Pearson included a plan to appoint a Royal Commission to study the proposal. Sir Powles also spoke to the McRuer Commission in Ontario<sup>82</sup> about the efficacy of the New Zealand Ombudsman role. Interestingly enough, Harry Arthurs of Osgoode Hall Law School, was also cited as testifying to the McRuer Commission in 1965 at which time he voiced support for a "...massive Ombudsman-like organization of lawyers, political scientists and psychologists..."<sup>83</sup> which would be responsible for helping Ontarians who were having difficulty with provincial government departments.<sup>84</sup> Given the interest developing in establishing some means for administrative oversight coupled with the timing of the establishment of the role in New Zealand, the first common law jurisdiction to establish the role, and the persuasiveness of Mr. Powles' commentary, the

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<sup>80</sup> *Ibid.* at 9.

<sup>81</sup> Stanley Anderson, *supra* note 32 at 30.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid* at 18.

<sup>84</sup> *Ibid.*

New Zealand model was adopted in Canada. In 1966, Stanley Anderson stated that aside from New Zealand and Scandinavia, from a world wide perspective Canada had shown the greatest interest in the Ombudsman institution. In fact he referred to the level of activity observed as a 'crescendo'.<sup>85</sup> It is worthy of note that Frank Stacey also observed in 1978 that in North America, Canadian jurisdictions had demonstrated the greatest zeal for establishing Ombuds offices.<sup>86</sup> In fact, Patrick J. Smith also refers to the period from 1977 to the time of writing of his paper in 2006 as the "Ombudsmania era".<sup>87</sup> In contrast, from 1969 – 1975 only four states, that is, Hawaii, Iowa, Nebraska and Alaska, in the United States of America had established Ombuds roles of general jurisdiction,<sup>88</sup> while all provinces except Prince Edward Island<sup>89</sup> had done so or were in the process of doing so in Canada. Interestingly the Canadian constitutional principle of 'Peace, Order and Good Government'<sup>90</sup> (POGG) as set out in the *Constitution Act* in 1867 is also found in Section 51 the Australian constitution now and the New Zealand constitution, formerly, thus sharing the constitutional expectation for POGG. Interestingly, by chance or by design, these jurisdictions are also very well populated with Ombuds roles.<sup>91</sup>

At this juncture in order to provide a foundation for further exploration of the theory and practice of ombuds activity, particularly as it relates to independence and impartiality, I

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<sup>85</sup> *Ibid.* at 36.

<sup>86</sup> Stacey, *supra* note 40 at 51.

<sup>87</sup> Patrick J. Smith, "Taking the 'Mal' out of Administration: Administrative Justice in British Columbia – the OmbudsOffice @29, Going on 30" (Paper presented to the Ombudsman and the Democratic Deficit, Canadian Political Science Association Conference, Toronto, June 2006 [unpublished] online: Canadian Political Science Association < <http://www.cpsa-acsp.ca> >).

<sup>88</sup> Stacey, *supra* note 40 at 51. Today, there is only one other state that has since established an Ombuds of general jurisdiction and that is Arizona.

<sup>89</sup> The Liberal government in PEI included its intent to establish a provincial Ombudsman in its 2007 election campaign. As this election promise has not come to fruition to date, Cynthia Dunsford, a member of the Legislative Assembly, announced that she would be proposing a private member's bill to create a provincial Ombudsman as she believes that elected members of the legislature do not have the capacity to address the kinds of complaints raised by their constituents. See "PEI Member of the Legislature calls for creation of provincial ombudsman", online: The News Serving Pictou County (2007) <<http://www.ngnews.ca/>>.

<sup>90</sup> *Constitution Act*, C. 1867, Section 91.

<sup>91</sup> *Commonwealth of Australia Constitution Act*, Section 51(as of 1997).

will delineate the evolution and current construction of what I consider to be the three primary models of Ombuds operating in Canada and how they came to be established. In my view, the models of practice in place include: 'classical/legislative/parliamentary', 'hybrid', and 'organizational'. For ease of understanding, following a general description of how each model was created, I will use standard criteria to demonstrate how each of the three models fulfills their mandates.

## **Chapter 2: Ombuds Models**

### **The Classical/Legislative/Parliamentary Ombuds (Legislative Ombuds)**

The classical, legislative or parliamentary Ombuds<sup>92</sup> is established by statute and operates at arms length from the establishing entity. It has a high degree of structural independence and a requirement for impartiality as well as having the authority and responsibility to maintain confidentiality. In addition, the legislative Ombuds has strong powers of investigation and the ability to determine what procedures and dispute resolution techniques it will use in implementing its mandate. Ultimately, when a determination is made that a complaint is valid, conclusions and recommendations are made rather than a binding directive being issued.

In addition, it is important to recognize that a variety of supplementary mandates have been provided to some of the Ombuds of general jurisdiction established via statute in Canada. This contributes to the complexity associated with providing a concise, easily understandable definition of the Ombuds role. The idiosyncratic approaches taken by the provincial and territorial legislatures which established these roles are illustrative of the unique construction of some governmental Ombuds roles even within this very specific frame of reference for Ombuds activity, that is, the Ombuds role established by legislation. For instance, in 1967 both the Alberta Ombudsman and New Brunswick Ombudsman were created<sup>93</sup> with responsibility for general governmental administrative oversight. However, as result of additional legislative activity, the Ombudsman for New Brunswick took on a multiplicity of mandates. For instance, until April 2011 this Ombudsman was also

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<sup>92</sup> Please note that when I am describing Ombuds established by legislation the entities which are included are those bodies which do not have power of prosecution or enforcement and do not serve a regulatory, disciplinary or compliance function consistent with the foundational principles of the Danish Ombudsman model as originally established in Canada.

<sup>93</sup> Stacey, *supra* note 40 at 51. It is noteworthy that Joe Loran, current Deputy Ombudsman for the province of Alberta indicated in a speech on June 6, 2012 in Edmonton, Alberta at the Association of Canadian College and University Ombudspersons that when the Alberta Ombudsman role was established there were only ten Ombudsman roles in existence world wide.

the Child and Youth Advocate;<sup>94</sup> and had the responsibility to review decisions made by government with respect to the protection of personal information<sup>95</sup> until an Access to Information and Privacy Commissioner was recently established. The New Brunswick Ombudsman is also responsible for complaints related to the provincial archives<sup>96</sup> and is empowered to review civil service employee appointments.<sup>97</sup> Next, in 1968 the Le Protecteur du Citoyen/ Québec Ombudsman was enacted<sup>98</sup> and in 2001 the mandate of the Health and Social Services Ombudsman was incorporated into that of the Protecteur du Citoyen.<sup>99</sup> In 1969 the Nova Scotia Ombudsman<sup>100</sup> and the Manitoba Ombudsman<sup>101</sup> were established. However, while the Manitoba Ombudsman was originally established with responsibility for administrative oversight of general jurisdiction only, from 1988 - 1997 the Office also became responsible for complaints related to the implementation of the *Freedom of Information Act* M.1988.<sup>102</sup> As of 1997, responsibility for complaints related to the administration of the *Personal Health Information Act*, M.1997 and the *Freedom of Information and Protection of Privacy Act*, M.1997<sup>103</sup> followed. In 1973 the Saskatchewan Ombudsman<sup>104</sup> was established followed by the Ontario Ombudsman in 1975<sup>105</sup> with the most restricted mandate of any Ombuds of general jurisdiction in Canada as is evidenced

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<sup>94</sup> See the *Child and Youth Advocate Act*, N.B. 2007. In other jurisdictions, this function is typically a stand-alone entity.

<sup>95</sup> See *Right to Information Act* N.B. 2001 and the *Protection of Personal Information Act* N.B. 2001 and Stewart Hyson, ed., *Provincial and Territorial Ombudsman Offices in Canada* (Toronto: University of Toronto Press, 2009) at 106.

<sup>96</sup> See *1997 Archives Act*, N.B. 1997

<sup>97</sup> See *Civil Service Act*, N.B.1994.

<sup>98</sup> Stacey, *supra* note 40 at 51.

<sup>99</sup> "History" Le Protecteur du citoyen/The Québec Ombudsman online: <<http://www.protecteurducitoyen.qc.ca>>.

<sup>100</sup> Stacey, *supra* note 40 at 45. For a short period of time in the 1990's the Nova Scotia was also required to serve as the Human Rights Commissioner due to fiscal woes.

<sup>101</sup> *Ibid.*

<sup>102</sup> Hyson, *supra* note 95 at 83.

<sup>103</sup> The function of oversight of Freedom of Information and Protection of Privacy legislation is performed by separate Commissioners in other provinces.

<sup>104</sup> Stacey, *supra* note 40 at 51.

<sup>105</sup> *Ibid.*

in the comparative chart prepared by the current Ombudsman for Ontario<sup>106</sup> as part of his lobbying efforts to expand his jurisdiction to include municipalities, universities, social services and hospitals (MUSH). The following chart demonstrates at a granular level, both the differences and similarities in the provincial and territorial Ombuds' of general jurisdiction mandates in relation to MUSH.

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<sup>106</sup> "The Push for Mush" (7 June 2011), online: Ombudsman Ontario <<http://www.ombudsman.on.ca>>.



**Table 1: Summary of Jurisdiction of Legislated Ombuds of General Jurisdiction in Canada in the areas of Municipalities, Universities, Social Services and Hospitals (MUSH) a.k.a 'The Push for Mush'**

Province/ Territory Ombudsperson/man	Boards of Education	Child Protection Services	Public Hospitals	Nursing Homes/ Long Term Care (LTC) Facilities	Municipalities	Police Complaints Review Mechanisms	Universities
Alberta (AB)	No	Yes	Yes <sup>107</sup>	Yes <sup>108</sup>	No	Yes	No
British Columbia (BC)	Yes	Yes	Yes <sup>109</sup>	Yes	Yes	No	Yes
Manitoba (MB)	No	Yes	Yes	Yes	Yes	Yes <sup>110</sup>	No
New Brunswick (NB)	Yes	Yes <sup>111</sup>	Yes <sup>112</sup>	No	Yes	Yes <sup>113</sup>	No
Newfoundland & Labrador	Yes	Yes	Yes	Yes	No	Yes	Yes
Nova Scotia	Yes	Yes	Yes	Yes	Yes	Yes	No
Ontario	No	No	No	No	No <sup>114</sup>	No	No
Québec	No	Yes <sup>115</sup>	Yes	Yes	No	Yes	No
Saskatchewan	No	Yes	Yes	Yes	No	Yes	No
Yukon	Yes	Yes	Yes	Yes	By reference <sup>116</sup>	No <sup>117</sup>	No

Please note that this chart is configured somewhat differently than the original entitled "The Push for Mush"<sup>118</sup> amended June 2011 in that the jurisdictions are ordered alphabetically for ease of reading and acronyms have been used in the footnotes rather than repeating the name of the province or territory in full.

<sup>107</sup> The AB Ombudsman has jurisdiction to investigate complaints about the patient concerns resolution processes of hospitals.

<sup>108</sup> The AB Ombudsman has jurisdiction to investigate complaints about the patient concerns resolution processes of LTC facilities and nursing homes.

<sup>109</sup> The BC Ombudsperson has jurisdiction over regional health boards and regional hospital districts.

<sup>110</sup> The MB the Ombudsman's jurisdiction over police, which are municipal, flows from her jurisdiction over municipalities. The Ombudsman also has jurisdiction over the Law Enforcement Agency (LERA) which is part of the Justice Department.

<sup>111</sup> The NB Ombudsman is prevented from investigating a matter that is or has been investigated or reviewed by the the Office of the Child and Youth Advocate. The NB Ombudsman is also the Child and Youth Advocate.

<sup>112</sup> The NB Ombudsman has jurisdiction over Regional Health Authorities, which operate, own and dispense all services in hospitals.

<sup>113</sup> The NB Ombudsman has jurisdiction over the NB Police Commission. The Commission is not included in the Schedule to The Ombudsman Act, but the Ombudsman has a working agreement with the Commission allowing them to review Commission files.

<sup>114</sup> The Ombudsman can investigate some municipal closed meetings.

<sup>115</sup> Le Protecteur du citoyen has some jurisdiction over administrative procedural matters relating to child protection services provided for by the directors of youth protection.

<sup>116</sup> A municipality or Yukon First Nation government may at any time refer a matter to the Ombudsman for investigation and report.

<sup>117</sup> The only police force operating in the Yukon is the RCMP, a federal body.

<sup>118</sup> Ombudsman Ontario, *supra* note 106.

In 1975, the same year that the Ombudsman for Ontario was created, the Newfoundland and Labrador Parliamentary Commissioner was finally established after the underlying legislation being passed in 1970<sup>119</sup> with broad jurisdiction that included universities, social services and hospitals but not municipalities. However, in 1990 after such a strong beginning, the Newfoundland and Labrador government de-commissioned the Office due to a change in political philosophy. The Premier at the time held the view that the Ombudsman was an unnecessary expense as he believed Members of the House of Assembly should be serving as Ombudsmen.<sup>120</sup> This belief is intriguing given that elected politicians are by definition partisan and do not necessarily come equipped with the requisite dispute resolution and investigative skills nor do they necessarily have the staff resources required to resolve complaints fairly and expeditiously. Subsequently, in 2002, the role was re-established under the name of the Citizens' Representative for Newfoundland and Labrador and a second responsibility was added via the *House of Assembly Accountability, Integrity and Administration Act* that provides for the Citizens' Representative to investigate gross mismanagement within the confines of the House of Assembly (the legislature).<sup>121</sup> Interestingly, the Citizens' Representative requested in 2010, after consultation with public representatives, his own staff and citizens of the province, that the Legislative Assembly change the name from 'Citizen's Representative' to 'Ombudsman' so the role of the Office would be more accurately identified.<sup>122</sup> To date, this change has not been made.

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<sup>119</sup> Stacey, *supra* note 40 at 45.

<sup>120</sup> Bradley Moss, "Expedition Sailors: The Ombudsman in Newfoundland and Labrador" in Stewart Hyson, ed., *Provincial and Territorial Ombudsman Offices in Canada* (Toronto: University of Toronto Press, 2009) 126 at 128.

<sup>121</sup> "Review of the Governing Legislation of the Office of the Citizens' Representative" (March 2010) at 3, online: Citizen's Representative of Newfoundland and Labrador <<http://www.citizensrep.nl.ca>>.

<sup>122</sup> *Ibid.* at 4.

In 1977 the British Columbia Ombudsman for general governmental administrative oversight was created.<sup>123</sup> Lastly, the most recent addition to the governmental Ombuds of general jurisdiction was established by statute in 1996 as the Yukon Territory Ombudsman. However, in this instance, the part-time role was designed to be dual purpose and included the responsibility of the Freedom of Information and Privacy Commissioner as well.<sup>124</sup> Presumably this approach was taken given the small population size of the jurisdiction, which was identified as 27,797 in 1991 and 30,776 in 1996.<sup>125</sup>

Both Frank Stacey<sup>126</sup> and Donald C. Rowat,<sup>127</sup> agreed that all of the Canadian provincial offices were established using the New Zealand model. In particular, Rowat articulated such foundational characteristics as: any person held in a prison or mental health facility has the right to have his or her written sealed complaint delivered to the Ombudsman unopened; the Ombudsman Office should be a place of last resort and investigations may not be undertaken until all available appeal routes (except for litigation via the judicial system) have been exhausted and, the Ombudsman may not review decisions issued by a court. This final characteristic as noted previously deviates from the Swedish (as well as the Finnish and Polish) model of ombudsman statutes which provide for oversight of courts<sup>128</sup> in the same fashion as the usual oversight of governmental administrative activities.<sup>129</sup> However, it is important to note that while the Swedish and

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<sup>123</sup> Patrick J. Smith "Fairness Inc.: Administrative Justice in B.C. – The Ombudsman Office at Thirty" in Stewart Hyson, ed., *Provincial and Territorial Ombudsman Offices in Canada*, Toronto: University of Toronto Press, 2009) 53 at 53. Please note that as of 2009, the B.C. Ombuds role is now officially recognized via legislative amendment as the British Columbia Ombudsperson in *The Ombudsperson Act*, R.S. B.C. 1996 c. 340.

<sup>124</sup> *The Ombudsman Act*, Yukon Territory was made effective in 1996. online: <<http://www.ombudsman.yk.ca/>>.

<sup>125</sup> Statistics Canada, "Population, urban and rural, by province and territory (Yukon)", online: Statistics Canada <<http://statcan.gc.ca>>.

<sup>126</sup> Stacey, *supra* note 40 at 52.

<sup>127</sup> Donald C. Rowat, *The Ombudsman Plan: The Worldwide Spread of An Idea* (University Press of America: Boston, 1985) at 33.

<sup>128</sup> Gabriel Kucsko-Stadlmayer, *European Ombudsman-Institutions: a comparative legal analysis regarding the multifaceted realisation of an idea*, (Springer: Wein; New York, 2008) at 27.

<sup>129</sup> "About the Parliamentary Ombudsmen", online: The Parliamentary Ombudsmen <<http://www.jo.se>>.

Finnish Ombudsman legislation allow for intervention in court proceedings even to the extent of contacting judges to acquire both substantive and procedural information on cases being reviewed, as well as having the authority to impose penalties for lack of cooperation, current Swedish Ombudsmen responsible for judicial oversight have voluntarily limited their reviews to matters of procedure in an effort to demonstrate respect for the independence of the judiciary.<sup>130</sup> Interestingly enough, by comparison, the Finnish Ombudsman, still reviews jurisprudence for inappropriate exercise of judicial discretion.<sup>131</sup>

In 1992 Rowat called for the inclusion of judicial oversight as the way of the future for Canada as has been practiced by Swedish and Finnish Ombudsman, in different ways, since the inception of their roles.<sup>132</sup> This recommendation, though, has been rebutted by at least one legal scholar, T.J. Christian who argued that the Canadian constitution would not allow for such activity.<sup>133</sup> However, Stephen Owen who is both a respected legal scholar, former Deputy Attorney-General for the province of British Columbia, and a former federal Member of Parliament, in addition to having served as the British Columbia Ombudsman, has opined that the establishment of an Ombuds via legislation with circumscribed supervision over the judiciary would not compromise judicial independence as oversight would be limited.<sup>134</sup> Owen also observed that Canadian Ombuds in many jurisdictions already have oversight of police, prosecutors, probation and parole officers, court staff, registrars, prison officials and also review decisions of administrative tribunals. In future, he suggests that a beneficial evolution of Ombuds oversight would be to expand

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<sup>130</sup> Kucsko-Stadlmayer, *supra* note 128 at 26.

<sup>131</sup> *Ibid.*

<sup>132</sup> Donald C. Rowat, "Why An Ombudsman to Supervise the Courts? (1992) 10 The Ombudsman Journal in Linda C. Reif, ed., *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, (Cambridge: Kluwer Law International, 1999) at 527.

<sup>133</sup> T.J. Christian, T.J. "Why No Ombudsman to Supervise the Courts in Canada?" (1995) The Ombudsman Concept, in L.C. Reif, ed., *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, (Cambridge: Kluwer Law International, 1999) 539.

<sup>134</sup> Stephen Owen, "Why We Need a Federal Ombudsman" (1992) Policy Options, 13 (6) at 4.

jurisdiction to include the conduct of judges (as distinct from their decisions) or the review of decisions of judicial councils if complainants felt inaction on the part of the council was unacceptable.<sup>135</sup> Since an Ombuds of general jurisdiction has not yet been established for the oversight of federal government administration in Canada, the discussion about whether or not the Canadian constitution allows for judicial oversight has not been initiated on a broader scale.

It is worthwhile to look at what happened, or stated more precisely, what didn't happen with respect to the establishment of an Ombuds of general jurisdiction for Canada at a federal level. If any of the following attempts had come to fruition one can now easily see how differently organized administrative oversight for federal government activities might be now. For example, in 1960, a Member of Parliament, Douglas Fisher, proposed a resolution asking the government to consider establishing an office of redress for administrative grievances from citizens based on the Scandinavian model of Ombudsman.<sup>136</sup> Following this initiative, as early as 1963 a more robust proposal was made via a Royal Commission lead by J. Grant Glassco<sup>137</sup> reporting on how the federal government should be organized on a more general basis which also recommended that a Parliamentary Commissioner founded on the ombudsman model as established in Sweden be put in place.<sup>138</sup> Following the Glassco report, the Standing Committee on Privileges and Elections in 1965 after scrutinizing Bill C-7 entitled *Act to Establish the Office of the Parliamentary Commissioner* recommended that an Ombudsman be established for the purpose of receiving complaints from the public about government

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<sup>135</sup> *Ibid.*

<sup>136</sup> Lundvik, *supra* note 45 at 11 and Stanley Anderson, *supra* note 32 at 27.

<sup>137</sup> Lundvik, *ibid.* at 12; Philip Rosen, "The Ombudsman, The Legislature, and Legislators", Background Paper for Parliamentarians, June 1978, Library of Parliament at 25; Friedmann, *supra* note 46 at 12

<sup>138</sup> Rosen, *ibid.*

actions. The Committee also went a step further to recommend that each province should be 'urged' to establish the same type of role in their jurisdiction.<sup>139</sup> It appears that no further action was taken by the federal government relative to these recommendations at that juncture.

Thirteen different private members' bills were introduced between 1962 and 1976 for the purpose of establishing a national Ombudsman without any success.<sup>140</sup> This flurry of activity at a federal level may also be the reason Smith opined that a wave of 'ombudsmania' was developing within Canada.<sup>141</sup> However, no federal ombudsman institution of general jurisdiction came into being as a result of these initiatives. Then, in 1976, initiated by then Prime Minister, Pierre Trudeau, another effort of significant proportion was directed to studying the notion of a federal Ombudsman of general jurisdiction. A group of senior federal bureaucrats, the majority of whom were Deputy Ministers, was assembled to study the concept and make a recommendation. The resulting recommendations delivered in 1977 by Deputy Minister John Love, posited the creation of a federal Ombudsman of general jurisdiction, based on the New Zealand model, established as an Officer of Parliament, with the power to address all manner of complaints about administrative actions.<sup>142</sup> This report appears to have been accepted by the Prime Minister and the Liberal Party as the idea of a federal Ombudsman was introduced to the country in 1977 via the Throne Speech and proposed legislation for establishing a federal Ombudsman was identified as Bill C-43. This proposal was based on the recommendations made in the previously described report and was introduced by

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<sup>139</sup> *Ibid.* at 26.

<sup>140</sup> *Ibid.*

<sup>141</sup> Smith, *supra* note 87.

<sup>142</sup> J.D. Love, Chairman of the Committee on the Concept of the Ombudsman, "Report of the Committee of the Concept of the Ombudsman" Ottawa, Government of Canada, 1977. This is a 69 page report providing a detailed analysis and recommendations on jurisdiction, methodologies for establishment and operation of the proposed Office of the Ombudsman.

the Justice Minister of the time, Ron Basford, in the spring of 1978. However, this bill did not make it off the Order Paper. Apparently the government indicated its commitment to continue with this legislation in its subsequent 1978 Throne Speech but then walked away from it shortly thereafter for fiscal reasons.<sup>143</sup>

Interestingly enough, Karl Friedmann, Ombudsman for the province of British Columbia at that time, and A.G. Milne, who was affiliated with Magdalen College at Oxford, examined Bill C-43 and found it wanting in many areas. They described it as "...an exceedingly narrow, rigid and subservient conception..."<sup>144</sup> resulting in what these critics considered to be a "third rate Ombudsman".<sup>145</sup> Hence, these authors weighed in with many changes to provide for a greater degree of *de jure* independence and ironically given our current understanding of the importance of self-reflection and self-discipline for the maintenance of an impartial and independent Office, argued for less emphasis and dependence on the personal and stellar qualities of the appointee. They also recommended a greater degree of informality in the implementation of the mandate and a more expansive approach to jurisdiction along with the ability to comment on policy while maintaining the normal authority for investigating administrative activity.

Yet another attempt was made in 1989 and 1990 when Kim Campbell, former Minister of Justice and Attorney General and Minister of Defence and briefly, the Prime Minister of Canada, asked Stephen Owen, former Ombudsman for British Columbia, to prepare a model for a federal Ombudsman. The model he developed was then included in Ms. Campbell's policy promises for the 1993 election. However, as Ms. Campbell's

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<sup>143</sup> K.A. Friedmann and A.G. Milne "The Federal Ombudsman Legislation: A Critique of Bill C-43" Canadian Public Policy Vol.6, No.1, Winter, 1980 63 at 64. Philip Rosen's, (*supra* note 137) description of what happened with the attempted passage of legislation is very similar.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

government was defeated and she lost her own seat, the policy never became law.<sup>146</sup> One of the key features of Mr. Owen's proposal was the opportunity its establishment would provide to reduce duplication of effort, confusion and costs for the various Commissioners (also known as Officers of the Legislature) themselves, the agencies responding to their inquiries, the legislature and the public. For example, he proposed an umbrella approach whereby the federal Ombudsman, who would have general jurisdiction of all federal administrative matters, would also serve a coordinating function in relation to the Parliamentary Officers with solo jurisdictions.<sup>147</sup> In his oral presentation Mr. Owen indicated each of these Officers would become a Deputy Ombudsman.<sup>148</sup> This kind of construction would have allowed for a high concentration of both specialized and generalized oversight expertise in one independent body. It was also suggested that in order to increase efficiency, arrangements would be made, where appropriate and with the agreement of the provincial Ombudsman, to delegate the jurisdiction of the federal Ombudsman, so as to reduce the start up costs; to provide complainants with easier geographical access; and to allow for the efficient handling of complaints that related to a number of different levels of government. As well, the model included the establishment of a Director of Accountability for each public body that reported to the Chief Executive Officer (CEO) of the organization and liaised with the Ombudsman. The individual in this position would be responsible for contributing to an ethos of fairness throughout the organization with the ultimate objective being that the agency or department would deal with complaints first and in so doing, learn what areas of unfairness were causing concern

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<sup>146</sup> Stephen Owen, "A Proliferation of Ombudsman: Good, Bad or Ugly" (Keynote Address delivered at the Forum of Canadian Ombudsman Conference/Association of Canadian College and University Ombudspersons Conference, Vancouver, 17 May 2011) [unpublished].

<sup>147</sup> Owen, *supra* note 134 at 4.

<sup>148</sup> Owen, *supra* note 146.



so they could be corrected without the Ombudsman's involvement. In the event the complainant was not satisfied with the agency's review and any action taken, the complaint could then be investigated by the Ombudsman.<sup>149</sup>

The foregoing exploration demonstrates how the legislative Ombuds roles of general jurisdiction were initially established in Canada and why the New Zealand model was the chosen by the 'early adopter' provinces in the 1960s and 70s. It is also evident that the original model of general jurisdiction mutated as time went on to include various specialized functions under one entity at some provincial and one territorial levels. Interestingly enough, Britain was exploring the concept at the same time as the first provincial Ombuds roles were legislated in Canada but as that government engaged in an extensive and lengthy consultation process, the British equivalent - Parliamentary Commissioner for Administration - was not legislated until 1967.<sup>150</sup> As a result, at the time of the first indication of interest in Ombuds roles by political scientists in Canada, there was no established British model to follow. Ultimately, the British model adopted was that of a Parliamentary Commissioner of a more specialized nature that initially was only allowed to accept complaints via Members of Parliament (MP) acting on behalf of their constituents. It appears the rationale for requiring the MP's involvement was to ensure passage of the bill as it was recognized that without including the MP's direct involvement in bringing complaints forward to the Commissioner on behalf of constituents the bill itself would never have been supported.<sup>151</sup> It is striking how limiting that kind of Ombuds model was as it is readily evident that citizens could easily be concerned about whether

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<sup>149</sup> Owen, *supra*, note 134 at 127.

<sup>150</sup> Gregory Roy & Peter Hutchesson, *The Parliamentary Ombudsman A Study in the Control of Administrative Action* (London: George Allen & Unwin Ltd., 1975) at 87; Charles Ablard, "The Parliamentary commissioner: the ombudsman for Parliament" (1987) *The International Ombudsman Institute: Occasional Paper* #40 June at 4.

<sup>151</sup> *Ibid.* at 93.

partisanship would influence how their complaint was reviewed if they could only submit it through their MP. In addition, those who did have confidence in and/or the ability to access their MP would also have to be comfortable with having the details of the outcome of the review of the complaint shared as well, as the Parliamentary Commissioner was required to report back in writing on the disposition of the complaint to the MP. As a result, the records show that it didn't take long for people to start approaching the Commissioner directly.<sup>152</sup> In addition, in the U.K., respondents can not only challenge the legislative Ombuds' jurisdiction, as is the case in Canada, but can also litigate conclusions and recommendations, and more recently, complainants are also using the judicial system to challenge the Ombuds findings or a refusal to take up a complaint.<sup>153</sup> Seneviratne comments on how this evolution is problematic as it militates against the essence of the Ombuds role which is to provide easy access to administrative redress through its flexible and informal approaches.<sup>154</sup> Similarly, one can only imagine how differently organized Canadian Ombuds institutions would be if a federal Ombudsman based on the original Swedish model, that is, including judicial oversight and prosecutorial powers, or if the Owen model had been acted on and all independent officers of the legislature were rolled into one major oversight body or if the British model had been adopted in Canada. Not surprisingly, given that there has been no central design in force, the current Ombuds landscape is a bit of a patchwork but perhaps also representative of an approach that is distinctive to Canada, given the regional differentiation and customization that is so much the norm in the Canadian confederation.

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<sup>152</sup> *Ibid.*

<sup>153</sup> Seneviratne, *supra* note 33 at 314.

<sup>154</sup> *Ibid.*

As my intent is to provide an accurate and complete overview of the Canadian Ombuds institution it is also instructive to know that the first Ombudsman for the province of New Brunswick, Ross Flemington, suggested the following characterization to the BC Human Rights Council in an address on the role of the Canadian Ombudsman: "Let's accept the definition that the Ombudsman is an independent and politically neutral officer of the Legislature".<sup>155</sup> This broad definition would therefore include the federal, provincial and territorial Auditors General, Integrity Commissioners, and Information and Privacy Commissioners, Language Commissioners, Police Commissioners, Environmental Commissioners, Chief Electoral Officers, etc. as Ombuds. However, it is noteworthy in this regard that the Supreme Court stated unequivocally in *The Auditor General of Canada v. The Minister of Energy, Mines and Resources, the Minister of Finance, the Deputy Minister of Energy, Mines and Resources, and the Deputy Minister of Finance Canada (Min. of Energy, Mines & Resources)*<sup>156</sup> that the Auditor General is not an ombudsperson by stating:

While acknowledging that the Auditor General fulfills a crucial function in the sphere of public accountability and thereby enhances our democratic system, the Auditor General does not play the same role as does an ombudsperson as protector of citizens against administrative abuse.

This commentary illustrates that the Supreme Court in 1989 made a conscious decision to demonstrate the distinctive nature of these two roles even though both are Officers of the Legislature. In an earlier attempt to demonstrate what is an Ombuds role and what is not, the drafters of the aforementioned Love Commission report, which recommended the establishment of a federal Ombudsman, took the position that the Privacy

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<sup>155</sup> "Ombudsmen in Canada" Proceedings of the Conference on Ombudsman "Let Justice Be seen To be Done" (Vancouver: British Columbia Human Rights Council, March 1970) at 22.

<sup>156</sup> *The Auditor General of Canada v. The Minister of Energy, Mines and Resources, the Minister of Finance, the Deputy Minister of Energy, Mines and Resources, and the Deputy Minister of Finance Canada (Min. of Energy, Mines & Resources)* [1989] SC.J. No. 80 at 75.

Commissioner and the then 'in development' Information Commissioner fulfilled ombudsman-type roles and should be folded in under the umbrella of the Ombudsman of general jurisdiction. However, it is worthy of note that the Commissioner of Official Languages was specifically excluded from Love's model for a federal Ombudsman as it was determined that this Commissioner was not restricted to only dealing with the implementation of legislation.<sup>157</sup> Interestingly enough, Yvan Gagnon did an assessment of the Office of the Commissioner of Official Languages (COL) a few years later in 1979 to determine if this Commissioner, and presumably, by extension, other specialized Commissioners, should be properly identified as ombudsmen. He determined by comparing the structure and powers of the COL to the standard definition of a classical Ombudsman that the COL "...to a considerable degree, both possesses the main characteristics of and performs the normal functions of any other ombudsman".<sup>158</sup> However, Gagnon went on to say that since the scope of the Commissioner's mandate is limited to one piece of legislation it would be more accurate to refer to him as a linguistic ombudsman<sup>159</sup> and then further refined this distinction to conclude that the term 'monojurisdictional'<sup>160</sup> would ultimately be a better identifier for this type of role. However, Ombudsman scholars Mary Marshall and Linda Reif refer to specialized or mono-jurisdictional Ombuds as "...attenuated ombudsman-like institutions".<sup>161</sup> To be attenuated is not necessarily a complimentary adjective in this context as it means "to weaken or reduce in force, intensity, effect, quantity, or value".<sup>162</sup> The Oxford English

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<sup>157</sup> Love, *supra* note 142 at 36.

<sup>158</sup> Yvan Gagnon, "Canada's Language Ombudsman: An Assessment of the Innovative Characteristics of the Office" Occasional Paper #3 (Occasional Paper Series: The International Ombudsman Institute, July 1979) at 10.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.* at 6.

<sup>161</sup> Mary A. Marshall and Linda C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995-1996) 34 *Alta L. Review* at 231.

<sup>162</sup> Dictionary.com online: <<http://dictionary.reference.com/browse/attenuated>>, s.v. "attenuated".

Dictionary provides a similar definition in that it also emphasizes "...the reduction of strength, effect or value".<sup>163</sup> Marshall and Reif's terminology suggests that this type of Office is therefore not as forceful, effective or valuable as an Ombuds role established for oversight of general administration. I take umbrage with that characterization and would suggest, instead, that it is more accurate to describe Commissioners of this nature as performing an 'ombuds-like function'. Initially it might be said that they operate in their specific sphere using an Ombuds model, in that they receive complaints, engage in mediation and conciliatory processes and/or investigate whether or not the complaints are valid, but they do so only in relation to specified pieces of legislation. As well, while some Commissioners only have the power to recommend and have no further recourse if the government chooses not to implement the recommendations, the Commissioner of Official Languages can apply to Court for a remedy if the government does not act on his recommendations. Similarly, the federal Privacy Commissioner can assist complainants to litigate their complaints if the government body does not accept the Privacy Commissioner's recommendation. The capacity to appeal to federal court to enforce a recommendation under the *PIPEDA* regime or to assist a complainant to seek judicial review via the *Privacy Act*<sup>164</sup> is a dramatic deviation from the aforementioned Ombuds role of the 'master persuader'<sup>165</sup> who relies on the quality of her investigation, conclusions and recommendations and/or the ability to articulate her concerns publicly as opposed to having the power of enforcement. As noted previously, all Ombuds of general jurisdiction in Canada, and in most developed countries, only have the power to recommend. To include roles that hold some degree of enforcement capacity would add

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<sup>163</sup> AskOxford.com online: <[http://askoxford.com/concise\\_oed](http://askoxford.com/concise_oed)>, s.v. "attenuate".

<sup>164</sup> Stoddart, *supra* note 36 at 10.

<sup>165</sup> Roberta Jamieson, "Alternative Dispute Resolution" Linda Reif, ed., *The Ombudsman Concept* (Edmonton:International Ombudsman Institute, 1995) at 619.

another significant and I would argue, incongruent dimension to this already complex and often misunderstood role. In addition, many hybrid and organizational Ombuds deliberately highlight in their promotional literature that they are not an office of notice or of compliance for the institution, department or organization about which they receive complaints. Clearly, language and privacy Commissioners are compliance officers<sup>166</sup> with respect to a specific piece of legislation. Hence, the potential for further confusion as to 'what is an Ombuds' is increased and perhaps even exacerbated by the specialized Commissioner with strong powers of enforcement being included in the mix. It must also be acknowledged that some provincial and one territorial Ombudsman also serve as Information and Privacy Commissioners as well as having overall oversight for government administration. In these instances, their offices are organized and identified as two separate entities<sup>167</sup> in comparison to the stand alone, specialized commissions created for investigation of violations of particular pieces of legislation and with varying degrees of enforcement capacity. A further complication, though, must also be mentioned. As was identified earlier through the discussion of the evolution of the classical or parliamentary Ombuds role there are differing points of view as to whether the federal Privacy Commissioner or the Commissioner for Official Languages should be identified as Ombuds.

Rather than this question being seen as a semantic debate or an esoteric discourse a major concern that has arisen with respect to the naming of the specialized Commissioner as an Ombudsman is so significant that it deserves its own explanation and analysis. As has been identified earlier on a number of occasions, the confidentiality of

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<sup>166</sup> Sossin & Houle, *supra* note 37 at 112.

<sup>167</sup> Even with the separation described above, it is apparent that great effort is made by the incumbents and their offices to demonstrate the differences between the two roles by issuing separate annual reports and having two separate websites specific to each function.

complainants' identities and the information garnered when making inquiries and investigations is imbedded in Ombuds' statutes and stipulated in terms of reference and policy and is considered an essential element or characteristic of the Ombuds role. However, a major incursion into the confidentiality of Ombuds investigations was found in *Lavigne*<sup>168</sup> a 2002 Supreme Court decision involving not only the Commissioner of Official Languages (COL) but also the Privacy Commissioner of Canada. This situation arose when Robert Lavigne, a federal public servant who worked for the former Department of National Health and Welfare (the department), complained to OCOL as he felt forced to use French. He alleged his rights with regard to the language he used at his work place and his opportunities for other employment and for promotion had been violated. When the OCOL investigators were conducting interviews in order to assess his claim they found that some employees did not want to provide information as they feared reprisal from the respondent. In order to get their cooperation the investigators assured the potential interviewees that their input would be held in confidence to the limits prescribed by the *Official Languages Act*. The investigators found that Lavigne's complaints were valid and the Department agreed to implement the COL's recommendations. While the investigation was being conducted Lavigne requested disclosure from COL of all of his personal information held in the files on the complaints under review. The information requested was provided except for the information provided by some employees which was acquired through the COL investigation. The disclosure of this information was refused on the basis that the Commissioner believed that to release it could have a negative impact on the conduct of its investigations. Lavigne then filed a complaint with the Privacy Commissioner and through mediation some of the interviewees agreed to have

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<sup>168</sup> *Lavigne v. Canada (Office of the Commissioner of Official Languages) and The Commissioner of Official Language v. Lavigne and the Privacy Commissioner of Canada*. [2002] S.C.J. No. 55 (QL).

the investigators' notes on their views and opinions of the respondent released to him. The Privacy Commissioner agreed with COL that the information obtained from interviewees who wanted the information they provided to the investigators kept confidential should be exempted. Lavigne then sought judicial review of this decision and indicated that he was now only requesting the notes taken in the COL interview with his supervisor. The Federal Court, Trial Division ordered disclosure of the personal information requested and denied the non-personal information. The Federal Court of Appeal affirmed that decision. This decision was appealed to the Supreme Court of Canada (SCC) to determine whether the disclosure of the information sought by Lavigne could reasonably be expected to be injurious to the conduct of lawful investigations. The SCC dismissed the complaint by the COL as it determined that he had not exercised his discretion properly. The COL argued, on a general basis, that if OCOL investigations were not confidential this would compromise its work. The SCC was of the view that the COL had to make his determination as to whether or not interview notes should be released on a case-by-case basis. This determination runs contrary to the notion that has been established with those provincial and territorial Ombuds of general jurisdiction whose enabling legislation exempts them from complying with freedom of information and privacy legislation and which also provides immunity from being called to testify or produce documents about information collected while investigating a complaint. For example, the British Columbia Ombudsperson legislation states explicitly:

The Ombudsperson or a person holding an office or appointment under the Ombudsperson must not give or be compelled to give evidence in a court or in proceedings of a judicial nature in respect of anything coming to his or her knowledge in the exercise of duties under this Act, except (a) to enforce the Ombudsperson's powers of investigation, (b) to enforce compliance with this Act, or (c) with respect to a trial of a person for perjury.<sup>169</sup>

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<sup>169</sup> *The Ombudsperson Act*, R.S. B.C. 1996 c. 340, s. 9(5).



Also, the province of Québec amended its *Cities and Towns Act* in 2006 not only to re-affirm the expansiveness of the investigative authority of Ombuds for municipalities but also to ensure the confidentiality of their files was protected.<sup>170</sup>

Similarly, it must be emphasized that the majority of hybrid and organizational Ombuds Offices, which by definition are not established by legislation, assert that all of their communications are confidential and their terms of reference or policy frameworks specify that their records may not be reviewed by anyone other than the Ombuds and staff. Furthermore, those Ombuds who abide by the Code of Ethics for the International Ombudsman Association operate on the following premise with respect to confidentiality:

The Ombudsman holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm.<sup>171</sup>

Similarly, in the Standards of Practice for the International Ombudsman Association it is also stated that:

Communications between the Ombudsman and others (made while the Ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the Ombudsman and the Ombudsman Office, rather than to any party to an issue. Others cannot waive this privilege.<sup>172</sup>

This expectation is supplemented by a 'best practice' approach that states the following:

3.3 The Ombudsman does not testify in any formal process inside the organization and resists testifying in any formal process outside of the organization regarding a visitor's contact with or confidential information communicated to the Ombudsman, even if given permission or requested to do so.<sup>173</sup>

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<sup>170</sup> *Cities and Towns Act* R.S.Q. c.19.

<sup>171</sup> International Ombudsman Association, "Code of Ethics"(January 2007) online: International Ombudsman Association <<http://www.ombudsassociation.org>>.

<sup>172</sup> International Ombudsman Association, "IOA Standards of Practice" (October 2009) online: International Ombudsman Association <<http://www.ombudsassociation.org>>.

<sup>173</sup> International Ombudsman Association, "IOA Best Practices, A Supplement to IOA's Standards of Practice"(October 13, 2009) online: International Ombudsman Association <<http://www.ombudsassociation.org>>.

However, in *Lavigne* it was indicated that the COL and the Privacy Commissioner are actually fulfilling the role of an 'Ombudsman' by stating: "In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role".<sup>174</sup> Further, Gonthier specifically provides one example from Marshall and Reif who stated that Ombudsman "As a rule, they may not disclose information they receive".<sup>175</sup> However, in direct opposition to the expectation for confidentiality of all Ombuds' communications and work product, in the final analysis, the SCC judgment was that, while in certain instances the COL could legitimately determine that disclosure of personal information would be injurious to the conduct of an investigation, given the intersection of the *Privacy Act* and the *Official Languages Act*, the COL could not defend blanket confidentiality or argue for it on a general basis. The SCC view was that the COL had to defend why in a particular case he should be able to protect his investigators' notes. This outcome is problematic for hybrid and organizational Ombuds whose confidentiality is not already protected by legislation. If the COL had not been specifically described by the SCC as fulfilling an Ombudsman role, the outcome of this case would not be so important to the individuals who make use of non-legislated Ombuds roles, and those who respond to this type of Ombuds queries given they do not enjoy confidentiality clauses and privacy provisions. This is just one example of how the use of the term 'Ombudsman' on a broad basis has resulted in potential negative consequences for Ombuds who abide by the ethic of confidentiality, given the normative expression of the role and its historical antecedents, but who are not protected by a legislated exemption.

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<sup>174</sup> *Lavigne*, *supra* note 168 at 37.

<sup>175</sup> *Ibid.*

The issue of confidentiality of records is further confused and illuminated by a letter issued by the Public Interest Advocacy Centre (the Centre) to Ms. Jennifer Stoddart, the federal Privacy Commissioner. The Centre sought full disclosure of the names of respondents, (e.g. major corporations), when Canada's Privacy Commissioner's findings are issued. The author, Mr. Lawford, references *Lavigne* in observing that the Privacy Commissioner has been identified as having "...such "ombudsman" like proceedings".<sup>176</sup> He also notes that the "...ombudsman model adopted for the Privacy Commissioner..."<sup>177</sup> has contributed to a lack of transparency. In this instance the argument is being made for the complainants' identities to be kept confidential, but for the names of the respondents to be made public. Mr. Lawford also advocates for the tradition of publicizing anonymized reports to be replaced with the publication of an agreed statement of facts along with the aforementioned names of the respondents. Lisa Austin also complains that the Privacy Commissioner does not 'out' the respondents which are the subject of complaints.<sup>178</sup> The current Privacy Commissioner, Jennifer Stoddart, argues in response to these concerns that *PIPEDA* is explicit in this area. She states: "The obligation of confidentiality is integral to an ombuds approach where it is intended to encourage parties to engage in a conciliatory process aimed at reaching resolution".<sup>179</sup> For an ombudsman to be required to report her findings in relation to all of the matters reviewed and the respondents involved, is yet another significant attack on the traditional notion of the Ombudsman solely determining what information can be shared publicly, if any, in order to ensure the privacy of its processes for all concerned.

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<sup>176</sup> Letter from John Lawford to Ms. Jennifer Stoddart, Privacy Commissioner of Canada (18 December 2003) at Page 3 online: The Public Interest Advocacy Group <<http://www.piac.ca>>.

<sup>177</sup> *Ibid.* at 5.

<sup>178</sup> Lisa Austin, "Reviewing PIPEDA: Control, Privacy and the Limits of Fair Information Practices", (2006) 44 *Canadian Business Law Journal* 21 at 27.

<sup>179</sup> Stoddart, *supra* note 36 at 6.

In my view, a more accurate view of an Ombuds has been identified by Christy Ford in discussing alternatives to judicial remedies for disputes regarding governmental action. She speaks to the existence of other official bodies within the public realm, specifically, freedom of information and privacy commissioners, the auditor general, provincial auditors, and human rights commissioners as being "...**similar** to ombudspersons"<sup>180</sup> rather than identifying these roles as Ombudspersons. I am drawing attention to that definition as the provinces and the territory that first established the Ombuds roles did so by articulating administrative oversight of general jurisdiction in the enabling legislation. The officers of the legislature with specialized or 'mono' mandates that were already in place at that time and have been established subsequently while they share many of the characteristics of the Ombuds role are responsible for only specified pieces of legislation and are in place to protect rights by ensuring compliance with the legislation. In addition, Officers of this type do not necessarily determine their own procedures and timelines and have limits on their ability to hold matters in confidence or in the case of the Auditors General are solely responsible for the forensic auditing of government activities as they relate to the expenditure and accountability for financial expenditures and reporting their findings on the effectiveness of the government's stewardship. In the final analysis, it may be more accurate to describe these Officers of the Legislature as being based on an Ombuds model with respect to impartiality, independence and accessibility, while acknowledging that they deviate from this model when they are accorded powers of enforcement or coercion. Further, when Officers of the Legislature do not have the authority to determine how they conduct their work, (e.g.

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<sup>180</sup> Christie L. Ford "Dogs and Tails: Remedies in Administrative Law" in *Administrative Law in Context*, eds. Colleen M. Flood and Lorne Sossin (Toronto: Emond Montgomery Publications Ltd., 2008) at 60. The emphasis on 'similar' in the quotation is mine.

timelines and approaches may be prescribed in the enabling legislation rather than being determined by the Ombuds as is appropriate to the situation), I would argue the Ombuds title is no longer applicable as well.

To round out the legislative Ombuds spectrum, continuing in the tradition of diversity for how Ombuds roles have been established in Canada, I will comment on how two current stand-alone municipal Ombuds roles were established via by-law and ratified by provincial statute. Notably, the City of Montréal established an Ombudsman in 2002 as a result of a resolution issued from the Montréal Summit Workshop on Democracy. Its enabling legislation which provides for oversight of government administrative activities entitled the '*By-Law concerning the ombudsman*'<sup>181</sup> was put in place in 2002. Subsequently, the Montréal Charter of Rights and Responsibilities as set down in 2006,<sup>182</sup> also provides for the Ombudsman to receive complaints about municipal politicians not abiding by the aforementioned Charter.

In contrast, the City of Toronto took a different route and established a separate position of Integrity Commissioner to provide a means for complaint resolution and education for local politicians on the Codes of Conduct, policies and legislated means put in place for ethical behaviour.<sup>183</sup> On an overall basis, the City of Toronto indicates that in an effort to demonstrate its commitment to accountability and transparency it mandated four oversight functions including the Auditor General, the Integrity Commissioner, a Lobbyist Registrar and an Ombudsman. The first Ombudsman was appointed in 2009 via the City of Toronto Act with responsibility "...for addressing concerns about City Services

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<sup>181</sup> CITY OF MONTRÉAL BY-LAW 02-146-1.

<sup>182</sup> "Our History" online: Ombudsman de Montréal <<http://ville.montreal.qc.ca>>.

<sup>183</sup> "Statutory Accountability Requirements" City of Toronto online: <<http://www.toronto.ca>>.

and investigating complaints about administrative unfairness".<sup>184</sup> It is also instructive that prior to both the Montréal and Toronto roles being established, in 1995 the City of Winnipeg created an Ombudsman of general jurisdiction via by-law. However, this office was eliminated in 2003<sup>185</sup> when its authority to investigate complaints about municipal matters was legally added to the Manitoba Ombudsman's mandate.<sup>186</sup>

The foregoing is illustrative of the idiosyncratic manner in which the Ombuds roles of general jurisdiction established by legislation came to be established at provincial/territorial and municipal levels. As is clear from the various configurations described, each legislative body responsible for the creation of an Ombuds role determined how the role would be configured based not only on historical considerations but also on its unique circumstances like size of population as well as cultural and political perspectives and institutional influences.

#### Hybrid and Organizational Ombuds Models

There are hundreds of hybrid and organizational roles in Canada. For example, over 150 individuals are employed in the financial services Ombuds area in the Greater Toronto area<sup>187</sup> alone and the Forum of Canadian Ombudsman has 575 individuals who participate on its list serve,<sup>188</sup> of which only a small proportion are legislative Ombuds and staff. Accordingly, it is not possible to provide a similar survey of the development of these types of roles. Rather, I will provide some examples of how Ombuds roles in

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<sup>184</sup> *Ibid.*

<sup>185</sup> Barry E. Tuckett, "Manitoba Ombudsman 2003 Annual Report" at 11 online: <http://www.ombudsman.mb.ca>

<sup>186</sup> There are other Ombuds of general jurisdiction in place in various municipalities in Canada, most notably, in smaller cities and towns in the province of Quebec. As they have been created not only through by-laws but also via executive fiat or are filled by a number of volunteers, e.g. Laval and Gatineau, I have not included these offices in this environmental scan.

<sup>187</sup> Statistic provided by the Ombudsman for Banking Services and Investments, Doug Melville in September 2010.

<sup>188</sup> Information provided by Steve Olive, Administrator for Forum of Canadian Ombudsman (FCO) in July, 2011.

these two categories came into being in order to provide context for the discussion of the three Ombuds models.

### The Hybrid Ombuds

For purposes of clarification, I am reiterating that I have chosen to use the term 'hybrid' in this context as it seems reasonable to consider any role that has maintained many of the characteristics of the original version as well as adding on different ones as a 'hybrid'. Restricting its use only to Ombuds who have oversight of government administrative activity and who also handle human rights complaints as posited by Linda Reif et al would be very limiting given how the Ombuds role has evolved in Canada.<sup>189</sup> It is important to recognize that I am not suggesting that the hybrid Ombuds role is the offspring of the legislative model and the organizational model. In fact, the hybrid model was well established in Canada before the organizational model came into use. In contrast to Reif's definition, Ellen Zweibel in "Hybrid Processes: Using Evaluation to Build Consensus" refers to hybrid processes within ADR as combining elements of evaluation, adjudication,<sup>190</sup> negotiation and mediation. She has used hybrid in this context to demonstrate that processes can evolve in such a fashion rather than being rigidly defined.<sup>191</sup> Following this line of thinking, as the Ombuds role has evolved in a wide variety of ways over time, the use of the term of 'hybrid', in my view, is particularly applicable to the Canadian context.

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<sup>189</sup> Linda C. Reif, a Canadian legal scholar, who has written extensively on the practice of legislative Ombuds has used the term 'hybrid' to define legislative Ombuds who are also responsible for reviewing complaints of human rights violations. See Linda Reif, Mary Marshall and Charles Ferris (eds). *"The Ombudsman: Diversity and Development..It's Time Has Arrived"* (Calgary: International Ombudsman Institute, 1993) and Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden; Boston: Martinus Nijhoff Publishers, 2004).

<sup>190</sup> Please keep in mind that by providing this definition I am not stating that Ombuds in Canada adjudicate. Rather, the opposite is true in that Ombuds' formulate conclusions and make recommendations which are non-binding.

<sup>191</sup> Ellen Zweibel, "Hybrid Processes: Using Evaluation to Build Consensus" in Julie Macfarlane, ed., *Dispute Resolution – Readings and Case Studies, Second Edition* (Toronto: Emond Montgomery Publications, 2003) at 557.

The hybrid Ombuds is established by policy, terms of reference, Memorandum of Understanding, Order in Council or charter. Typically these instruments provide for the authority to investigate, (often both on a reactive and proactive basis); access to all records; some degree of structural independence, (e.g. hires its own staff and has the authority to produce public reports); as well as the requirement for impartiality and the maintenance of confidentiality. In addition, this type of Ombuds role has the authority to determine its own administrative procedures, (e.g. record retention schedules and time lines for completing work), as well as determining which form of dispute resolution technique will be used for handling a complaint (e.g. facilitation of discussions, advice and referral, shuttle diplomacy and mediation) and/or initiating an investigation in response to a complaint or on an own-motion basis. Examples of hybrid Ombuds roles include:

- the majority of University and College Ombuds<sup>192</sup>
- the majority of Canadian Bank Ombuds who respond to complaints from customers and the over arching Ombudsman for Banking Services and Investments (OBSI)<sup>193</sup>
- media Ombuds roles (e.g. Canada Broadcasting Corporation<sup>194</sup> and Radio-Canada<sup>195</sup>)
- Crown Corporations, (e.g. Canada Post Corporation Ombudsman)<sup>196</sup>

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<sup>192</sup> Links to the websites of all university and college Ombuds who are members of the Association of Canadian University and College Ombudsperson (ACCUO) is available at this link:

<[http://www.uwo.ca/ombuds/accuo\\_aoucc/english/membership\\_websites.html](http://www.uwo.ca/ombuds/accuo_aoucc/english/membership_websites.html)>.

<sup>193</sup> The participating firms and the mandate for OBSI is available at this link:

<<http://www.obsi.ca/UI/ParticipatingFirms/ParticipatingFirms.aspx>>.

<sup>194</sup> The Office of the Ombudsman CBC online: <<http://www.cbc.ca/ombudsman/>>

<sup>195</sup> L'ombudsman de Radio-Canada online: <<http://blogues.radio-canada.ca/ombudsman/>>.

<sup>196</sup> Canada Post Ombudsman online: <<http://www.canadapost.ca>> .



- Federal governmental Ombuds, (e.g. National Defence and Canadian Forces Ombudsman,<sup>197</sup> Taxpayers' Ombudsman,<sup>198</sup> Office of the Federal Ombudsman for Victims of Crime)<sup>199</sup>
- Not-for-Profit Organizations, (e.g. some Community Care Access Centres in Ontario,<sup>200</sup> The Canadian Ski Patrol Association)<sup>201</sup>

### Organizational Ombuds

The organizational Ombuds is typically founded by policy, terms of reference or executive fiat and operates on the basis of *de facto* forms of independence along with the requirement to act impartially and maintain confidentiality. This type of Ombuds does not have the authority to investigate, but often has access to all organizational records and immediate access to the most senior personnel in order to generate discussion and gather intelligence about issues that are brought forward. It is most often found in large, private and public sector and not-for-profit organizations, and in some government departments and agencies. Typically, the people who can make use of the Ombuds' services are employees, and in some instances, consumers and suppliers. Often this type of Ombuds serves as a sounding board; assists with the generation and evaluation of options to resolve a concern; mediates disputes between peers (sometimes between supervisor and supervisee or client and service provider); facilitates conversations; and/or engages in shuttle diplomacy, and in some instances, conducts fact-finding exercises.

In addition, this type of Ombuds does trends analysis on a month-to-month or year-over-year basis so as to identify and provide recommendations to senior management on

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<sup>197</sup> The National Defence and Canadian Forces Ombudsman online: <<http://www.ombudsman.forces.gc.ca/index-eng.asp>>

<sup>198</sup> Canadian Taxpayers' Ombudsman online: <<http://www.oto-boc.gc.ca/menu-eng.html>>.

<sup>199</sup> Office of the Federal Ombudsman for Victims of Crime, online: <<http://www.victimsfirst.gc.ca>> .

<sup>200</sup> Community Care Access Centre, Toronto Central, online: <<http://www.ccac-ont.c>> .

<sup>201</sup> I met the Ombudsman for this Association at workshop sponsored by the Forum of Canadian Ombudsmen held in Toronto in September 2010. This Ombuds role has been in place for 15 years and conducts all manner of investigations.

the emergence or proliferation of systemic and/or system-wide concerns. However, when an issue is raised that can not be resolved by one of these means and requires investigation, typically the employee or client seeking assistance is referred to an office of compliance like the Human Resources Department or the Equity and Diversity Office in order for a formal investigation to be undertaken. Those occupying organizational Ombuds roles typically do not keep records and if they do, the records are non-identifying, brief notes and are shredded shortly after discussions have been concluded. It is also worthy of noting that the individuals who approach this type of Ombuds are typically called a 'visitor' or 'client' rather than a complainant.<sup>202</sup> Examples include:

- Corporations, (e.g. Protectrice de la personne/Corporate Ombudsman for Hydro-Québec, for employees of the majority of Canadian banks;<sup>203</sup> VIA Rail);<sup>204</sup>
- Not-for-profit organizations, (e.g. Canadian Franchise Association Ombudsman);  
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- Some federal government departments which handle employee complaints, (e.g. Health Canada,<sup>206</sup> Heritage Canada )<sup>207</sup>;
- Some law societies in Canada, specifically Alberta, British Columbia, Saskatchewan and Manitoba<sup>208</sup> set up Equity Ombudsperson roles which have

<sup>202</sup> 'Visitor' is the term used by the International Ombudsman Association to denote an individual who approaches an Ombuds for assistance. In my experience this term is used rarely in Canada and only by those who identify themselves as 'Organizational' Ombudsman.

<sup>203</sup> While the availability of an Ombuds is not explicitly promoted on the Royal Bank of Canada website, the name of the Employee Ombudsman (Ken Brown) is shown and a description of his role is provided. Office of the Ombudsman, online: RBC <<http://www.rbc.com>>.

<sup>204</sup> I am aware of the existence of this position as the current appointee is a member of International Ombudsman Association and the availability of the position was advertised throughout Ombuds professional association networks.

<sup>205</sup> "Franchise Ombudsman Program", online: Canadian Franchise Association <<http://www.cfa.ca>>.

<sup>206</sup> "Internal Ombudsman Service", online: Health Canada <<http://www.hc-sc.gc.ca>>. This was created in 2003.

<sup>207</sup> "Ombudsman Office of Values and Ethics", Organizational Chart for the Department of Canadian Heritage online: <<http://www.pch.gc.ca>>.

<sup>208</sup> "Equity Ombudsperson", The Law Society of Alberta online: <<http://www.lawsociety.ab.ca>> ; "The Equity Ombudsperson", The Law Society of British Columbia, online: <<http://www.lawsociety.bc.ca>>; "Equity/Diversity Policies, Ombudsperson", The

been designed to assist lawyers, support staff and law students to address harassment and discrimination they have experienced in their workplaces, that is, within law firms. In addition, the Manitoba Law Society Equity Ombudsperson also has the mandate to speak with clients of law firms who believe they have suffered harassment or discrimination.

All of the foregoing descriptions demonstrate the idiosyncratic nature of the Ombuds role depending on how it was established, where and by whom or what body. While the manner in which it was designed may vary and its powers and construction differ from category to category, it is important to note that independence and impartiality are ever present in each type of Ombuds role identified above. The next section will investigate how each model of Ombuds practice fulfills its inquisitorial mandate and how its collateral functions contribute to administrative fairness, using the former Right Honourable Supreme Court of Canada Chief Justice Brian Dickson's (Chief Justice Dickson) indicia in a landmark decision as an organizing framework.

#### Genesis and Implementation of Ombuds' Mandates

In order to appreciate the breadth and depth of the Ombuds' function in relation to its impact on administrative fairness and access to justice as well as the significance of the principles of impartiality and independence, a useful starting point for the definition of a modern Ombuds, wherever and how it was established in Canada, can be found in *British Columbia Development Corp. v. British Columbia (Ombudsman)*.<sup>209</sup> In this judgment former Chief Justice Dickson provided, in my view, the seminal

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Law Society of Saskatchewan online:<http://www.lawsociety.sk.ca>; "Equity Ombudsperson", The Law Society of Manitoba online: <<http://www.lawsociety.mb.ca>>.

<sup>209</sup> *British Columbia Development Corp. v. British Columbia (Ombudsman)* [1984] S.C.J. No.50 QL. This case is also referenced as the 'Friedmann case' as Karl Friedmann was the Ombudsman for British Columbia at the time the suit was launched. I was first introduced to this case by a University Ombudsman who advised that she always consulted *Friedmann* when she was encountering particularly difficult situations and needed guidance on how to proceed.

definition for a Canadian Ombuds as part of his rationale for determining that the Ombudsman for British Columbia did indeed have jurisdiction over a provincial Crown Corporation:

...The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman "can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds": *Re Ombudsman Act (1970)*, 72 W.W.R. 176 (Alta. S.C.), per Milvain C.J., at pp. 192-93. On the other hand, he may find the complaint groundless, not a rare occurrence, in which even his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned. In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.<sup>210</sup>

While this description was written to describe the role of a provincial Ombudsman established by legislation, I contend it also applies to 'hybrid' Ombuds roles and, if the investigation reference is removed, it is also applicable to organizational Ombuds roles, given that they are able to shed light on potential systemic issues through their analysis of trends, and make inquiries about the circumstances surrounding complaints raised even though they are not conducting investigations. Using Chief Justice Dickson's description as an anchor while taking into account the tremendous diversity evident in the various Ombuds roles across the country, I will analyze the three primary Ombuds models of practice from the following perspectives: the essential inquisitorial nature of the role as expressed through reactive investigations conducted in response to individual complaints as well as investigations undertaken proactively on an own motion or own initiative basis; the emphasis placed on addressing systemic and system-wide

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<sup>210</sup> *Ibid.* at IV (b).

concerns; the wide-spread use of early resolution modalities; the importance of accessibility and how it is achieved; and the use of preventative activities and the promulgation of fairness standards both for educative and Ombuds' accountability purposes.

Chief Justice Dickson provided useful commentary as to why the role of Ombudsman came to be established in Canada (and presumably in other jurisdictions) and perhaps contributed to the 'crescendo' observed by Anderson<sup>211</sup> and the 'ombudsmania' identified by Smith<sup>212</sup> in relation to Canada and by Rowat in relation to early developments in the U.S.<sup>213</sup> For instance, the then Chief Justice Dickson, noted that the increase in the size and complexity of government services, both from a qualitative and quantitative perspective along with the high degree of governmental involvement with all facets of citizens' lives, was unprecedented. As a result, the plethora of public agencies and boards that had to be established to implement governmental initiatives created the potential for increased instances of abuse of authority and poor administration. Dickson also observed that the traditional forms of government control over its bureaucracies, namely, the legislature, the courts and the executive branch, were neither well suited nor capable of providing adequate supervision. In addition, in some cases, these oversight bodies did not have the resources to investigate complaints about government maladministration. Where investigative capacity was available, that is, through the courts, there was often no legal remedy and if there was, the pursuit of it was tortuously slow and prohibitively

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<sup>211</sup> Stanley Anderson, *supra* note 32 at x.

<sup>212</sup> Smith, *supra* note 87 at 40.

<sup>213</sup> Donald D. Rowat. "Recent Developments in Ombudsmanship" (1967) 10 (1) Canadian Public Administration at 35.

expensive.<sup>214</sup> These conditions provided an ideal environment for the rise of the legislative Ombudsman in the last half of the twentieth century.

A similar impetus contributed to the growth of the hybrid Ombuds role within the banking system in Canada. David McNabb, a long serving RBC Group employee and now Deputy Ombudsman for client complaints, indicated that due to the volume of complaints from small businesses about poor treatment at the hands of the banks during the economic recession of the early 1990s, discussions with the federal regulator and the banking industry resulted in the creation of a national ADR program for non-binding mediation conducted by an independent third party.<sup>215</sup> After observing for a one year period in 1993 that the free mediation program set up for use by small business owners and the banks was not well used, then Finance Minister, Paul Martin, and the former head of the Canadian Banking Association, Helen Sinclair, agreed in 1994 that each of the large banks would establish an Ombudsman to handle complaints from small businesses. In 1996, an industry Ombudsman, known as the Canadian Banking Ombudsman, was put into place to respond to issues that could not be resolved with a particular Bank Ombudsman. Subsequently, one year later, the mandate was expanded to allow for individual customers to bring their complaints forward. As a result of these early agreements, as of 2006 approximately 95% of consumers of financial services (e.g. banking, investments and insurance), in Canada had access to 'industry specific' Ombuds at no cost.<sup>216</sup> It is noteworthy that in 2010 the recommendations made by the Ombudsman for Banking Services and Investments (OBSI) after an investigation

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<sup>214</sup> *Ibid.*

<sup>215</sup> David McNabb, "Adjudication Idols and Ombudsman Bridges: The Private Enterprise of Independence and Fairness" Conference on Consumer Finance Law, (2006) 60 (4) at 645.

<sup>216</sup> *Ibid.*

had been completed, coupled with the monetary compensation that arose from facilitation by OBSI staff with member banks, resulted in financial compensation of approximately three and half million dollars. For this particular time frame, complaints were supported in 29% of the cases reviewed.<sup>217</sup> Interestingly, in 2008 the Royal Bank ended its voluntary relationship with the OBSI and arranged with ADR Chambers (a private sector dispute resolution firm) to review complaints about conclusions reached by individual bank Ombudsman and serve as the oversight body for the RBC Bank Ombudsman's conclusions on the legitimacy of client complaints. Subsequently in 2011, TD Bank followed suit and has also retained ADR Chambers to fulfill the role previously held by OBSI.<sup>218</sup> This evolution is ironic as OBSI was evaluated in 2011 by an external body - The Navigator Company - and was accorded high praise for its accessibility, transparency and fairness.<sup>219</sup> The landscape in this area of endeavour has changed even more dramatically in 2012 as Finance Minister Jim Flaherty advised that, in opposition to the lobbying of consumer advocates, he will not force banks to use the services of OBSI. Instead, he is in the midst of developing rules and regulations that will allow banks to hire others to address disputes about individual Bank Ombudsman's determinations.<sup>220</sup>

Not surprisingly, the same kinds of forces, that being student discontent, contributed to the development of academic Ombuds roles throughout Canada. Long

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<sup>217</sup> OBSI 2010 Annual Report online: Ombudsman for Banking Services and Investments <<http://www.obsi.ca>> at 48.

<sup>218</sup> Unfortunately, it is not possible to compare the quantum of compensation recommended or facilitated by the ADR Chambers Banking Ombuds Office (ADRBO) as the ADRBO 2011 annual report does not provide this type of information in its publicly accessible report. See <<http://www.bankingombuds.ca>>.

<sup>219</sup> The Navigator Company, "Ombudsman for Banking Services and Investments 2011 Independent Review", online: Ombudsman for Banking Services and Investments <<http://www.obsi.ca>> at 7,8.

<sup>220</sup> Theresa Tedesco, "Ottawa to set new rules for Bank Mediators" The Financial Post (30 April 2012), online: Financial Post <<http://business.financialpost.com>>. Please note that in the 1990's the majority of major Canadian banks also established Ombuds' roles based on the organizational model of practice. These Ombuds roles were established to respond to employee concerns given the huge number of employees involved in these operations and the complex policy frameworks governing their employment.

serving academic Ombuds have observed that pressure came from student unions/associations initially through their lobbying the university administration to establish Ombuds roles to address the difficulties associated with increasingly bureaucratic structures. Many academic institutions had become so complex with respect to policy and procedure that they were difficult for many students to navigate and apply to their personal situations. As a result, it is not uncommon to see funding arrangements whereby the Ombuds role is financially supported both by the academic institution and by the student union(s) or associations, (e.g. University of Victoria, University of Western Ontario, McMaster University, Camosun College, Algonquin College, Simon Fraser University, Carleton University, etc.).<sup>221</sup> In a similar vein in 2009, President Alan Rock confirmed that the University of Ottawa after many years of consultation and consideration was finally in the last stages of approving the Terms of Reference for an Ombudsperson role that is also jointly funded by the University and the student associations. He expressed his support on his blog in the following manner:

I think it is high time for us to provide for such an officer. Having access to an independent, professional person who will carry out a thorough and objective assessment of matters in issue between members of our community is bound to make us all feel as though the system is a little fairer.<sup>222</sup>

The genesis of an Ombuds role can also be derived from a number of different community members, (e.g. parents, teachers, students, administrators, politicians), within

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<sup>221</sup> The joint funding model in place is described on the websites for each of these Ombudsperson Offices. One example is: "The SFU community is committed to the fair and just treatment of each and every member of the University community. SFU is proud to have established one of the first Ombuds Offices at a Canadian university. For over 40 years the Office has provided confidential, informal, independent, and neutral dispute resolution services to all members of the university community by providing information, advice, intervention and referrals. In keeping with this commitment, the University joined with the Simon Fraser Student Society (SFSS) and the Graduate Students Society (GSS) in 2008 to support the development of a new jointly funded Office of the Ombudsperson." Office of the Ombudsperson online: Simon Fraser University <<http://www.sfu.ca>>.

<sup>222</sup> Alan Rock, "Ombudsperson" on Rock Talk The University of Ottawa (14 April 2009), online: The University of Ottawa <<http://www.president.uottawa.ca/blog/>>.



a large political jurisdiction who concluded that there should be a means in place for providing a proper response to the complaints related to local schools. For example, the province of Québec in 2009 passed legislation that requires all Quebec school boards to establish a means for dealing with complaints from students and parents. For many this requirement has been translated into the establishment of a Student Ombudsman role. Writing in support of this initiative Chris Eustace of *The Gazette* states: "Access to a school board ombudsman ensures fair treatment for all, curbs abuse of power and relieves a lot of unhealthy stress. An ombudsman also provides policy-makers with recommendations to improve the education system. An ombudsman is a gift to the public".<sup>223</sup>

The foregoing examples are not intended to be exhaustive with respect to how various forms of Ombuds came into being but rather are illustrative of the type of forces at play at the time of development, specifically, a desire to humanize governmental organizations as well as public and private sector institutions that were increasing in size and influence and to provide informal and inexpensive means for complainants to hold their government administrator, bank manager or college employee accountable. In these milieux the Ombuds role is a dispute resolution mechanism that is designed to be independent, impartial, fair, flexible and easily accessed. In addition, it is very clear from Chief Justice Dickson's commentary that the Ombuds role was envisioned from the outset as an alternative to the traditional form of dispute resolution, that is litigation, by using informal means for dispute resolution based on an inquisitorial approach rather than being modelled on the adversarial tradition of court based dispute resolution.

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<sup>223</sup> Chris Eustace "Creation of school board ombudsman is a gift" *The Gazette* (Montreal) (20 November 2008), online: Canada.com Network <<http://www.canada.com/com>>.

The key characteristics as identified by former Chief Justice Dickson as they relate to the pursuit of administrative fairness and access to justice will now be examined in relation to each of the three models of Ombuds practice. This analysis is undertaken in order to provide an organizing platform for the common threads and distinctive differences in the dispute resolution processes employed within the plurality of Ombuds roles. This analysis will include in-depth illustrations of how the three generic Ombuds' models that contend operate in Canada fulfill their inquisitorial mandates, in an independent and impartial manner, and deliver on the promise of administrative fairness.

#### INVESTIGATIVE MANDATE

##### Classical, Legislative or Parliamentary Ombudsman (Legislative)

In order to demonstrate the legislative Ombuds' investigative mandate, prior to detailing the various methods of investigation used by a variety of provincial and territorial Ombuds, I will reference the Ombudsman Ontario enabling legislation for illustrative purposes. It is important to recognize as noted by M.A. Marshall and Linda Reif that the statutes created for comparable purposes across the country are extremely similar.<sup>224</sup> Specifically, the *Ombudsman Act*, R.S.O. 1990, (the *Act*) most recently amended in 2006, defines the function of the Ontario Ombudsman in Section 14 (1) as:

The function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his, her or its personal capacity.

After completing an investigation, the *Act* declares that the Ombudsman will then determine whether the act or omission being scrutinized:

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<sup>224</sup> Marshall & Reif, *supra* note 161 at 217.

...a) appears to have been contrary to law, b) was unreasonable, unjust, oppressive, or improperly discriminatory... c) was based wholly or partly on a mistake of law; or was wrong.<sup>225</sup>

However, prior to forming a final opinion that is adverse to a governmental organization or employee, the Ombudsman is required pursuant to Section 18(3) to provide tentative conclusions and recommendations to the head of the Ministry so that the Ministry can respond to the evidence assembled and the conclusions drawn from it. At this point, depending on the nature of the representations made by the Ministry or governmental agent, the Ombudsman may then decide to withdraw the report, do additional investigation, amend or refine the conclusions and/or change or maintain the conclusions, observations and recommendations as originally stated.

Given the emphasis on the independence of the Ombuds it is important to ask if the requirement to provide the respondent with tentative or preliminary conclusions and recommendations impinges on the autonomy of the Office or the impartiality of the Office holder. It appears to me that the rationale for providing this opportunity is to ensure the respondent is able to point out any errors or misunderstandings prior to a final report being issued. As well, an exchange of information at this stage in the process may result in a resolution such that there is no need to take the matter further and the resources that would have been used to create a final report can be dedicated to other useful purposes. However, the legislation is also constructed in such a fashion that if a Minister or senior staff attempted to exert pressure to downplay or forego issuing a negative report, if the Ombuds also maintains an independent mindset, the likelihood of any such pressure being effective is mitigated by the high degree of structural independence enjoyed by the Office.

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<sup>225</sup> *Ombudsman Act*, R.S.O. 2006, c. 35, Sched. C, s. 21 (1). Please note that the other provincial and territorial Ombuds of general jurisdiction have comparable enabling legislation.

If the Ombudsman determines that a governmental agency has made administrative errors or omissions that need to be rectified for fairness to prevail, a concluding report detailing the rationale for the recommendation(s) pursuant to Section 21 (3) may be issued along with the requisite recommendation(s) for correcting the area(s) identified. This report will be sent to the governmental organization involved and the Minister responsible for that entity, initially. The robust powers made available for publicly identifying unfairness are evident in the legislative authority provided by Section 21 (4) of the *Act*, which ensures that if a Ministry is recalcitrant or tardy in its response, the Ombudsman may forward a report to the Premier of the province and then all of the members of the legislature if within a reasonable period of time no action is taken by the government agency which the Ombudsman considers to be adequate and appropriate to the situation. The ability to report on an individual case beyond the Ministry directly to the Premier and then the legislature as a whole is yet another example of the strength of the structural independence afforded to this role. As well, the Ombudsman may release a report publicly at any time after the organization has been given notice of the Ombudsman's final determination.

Another unique characteristic of the classical or legislative Ombuds role is that she typically has vigorous powers for compelling testimony and the production of records in order to fulfill her investigative mandate. For example, in the Ontario *Ombudsman Act* it is stated in Section 19(2) that the Ombudsman may summon and examine under oath any complainant, government employee or any other person who is able to provide information related to the matter being investigated. Similarly, under Section 25 of the *Act*, the Ombudsman is empowered to enter any premises occupied by any governmental organization for the purposes of inspection and for conducting an investigation. In addition,

it is an offence under Section 27 of the *Act* that any person who without lawful rationale intentionally "...obstructs, hinders or resists..."<sup>226</sup> the Ombudsman or (any other person empowered to assist by the *Act*).

My understanding and experience is that these powers are rarely if ever used, but their existence demonstrates the degree of strength inherent in the legislative Ombudsman's investigatory powers so as to fulfill its inquisitorial mandate. In addition to these powers, the current Ontario Ombudsman has also established and published procedures for when he may notify the public about issues he is investigating in order to encourage more witnesses to provide information, or simply because he has concluded that the subject of the investigation is so compelling it is in the public interest for that information to be widely disseminated.<sup>227</sup> The Ombudsperson for British Columbia has taken this type of notice a step further by posting a questionnaire relating to an ongoing investigation, (e.g. the quality of seniors' care) on her website which could be responded to confidentially so as to inform her investigation of this subject matter on an even broader basis.<sup>228</sup> Further to that overture, Part II of the Ombudsperson's report, which is focused on improving the care of seniors in both community care as well as residential settings, was released in February 2012. This report detailed 143 findings and 176 recommendations and has generated immense media interest.<sup>229</sup>

A further protection exists via Section 24 (1) of the *Ontario Ombudsman Act* which prohibits any legal action being taken against the Ombudsman or his or her staff for any

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<sup>226</sup> *Ibid.* s. 27(a).

<sup>227</sup> "Procedures Under the Ombudsman Act" online: Ontario Ombudsman <<http://www.ombudsman.on.ca>>.

<sup>228</sup> Wendy Stueck, "Seniors Care in B.C. gets mixed review" *The Globe and Mail* (17, December 2009), online: The Globe and Mail <<http://www.theglobeandmail.com>>. It is worthy of note that this reporter also added a new term to the Ombuds lexicon through her story, that of 'Ombudswoman'.

<sup>229</sup> Ombudsperson B.C.'s Independent Voice for Fairness, News Release, NR12-01, "Improving the Care of Seniors: Ombudsperson Releases Report with 176 Recommendations" (14 February 2012), online: BC Ombudsperson <<http://www.ombudsman.bc.ca>>.

action taken or report made in fulfilling the function of the Office unless it is done in bad faith. In addition, except if a person is being tried for perjury, as stated in Section 19 (6), none of the information acquired by the Ombudsman during the course of conducting an inquiry or an investigation can be used in court proceedings for any purpose.

Finally, Ombudsman legislation for Ontario and the majority<sup>230</sup> of other classical Offices allows for the Ombuds to initiate investigations on her 'own motion' on a proactive basis as opposed to being limited to taking up only those issues that are brought to her attention by complainants. This power again demonstrates the high degree of structural independence enjoyed by the legislated Ombuds. These types of investigations often result in a 'special' report being issued on a specific area of government activity. While special reports are issued at the discretion of the Ombuds, each legislative Ombuds is required to report annually on the work undertaken by her Office and to submit that report to the Speaker of the House who will then bring it to the attention of the Legislature. While the annual report is considered to be a measure of accountability for the Ombuds Office itself, it is also a key means by which the Ombuds can publicly demonstrate her independence, impartiality and efficacy in contributing to fair decision-making.

All of the provisions described above demonstrate the independence of the Office; its inquisitorial nature and the strength of the investigative and reporting responsibilities afforded to it by its enabling legislation. In addition, these types of legislated powers also, in my opinion, loudly proclaim the high expectations held by the legislators and, presumably, the electorate, for this type of Ombudsman to use all of the resources at her

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<sup>230</sup> The Yukon Territory Ombudsman legislation does not allow for investigations to be initiated other than via the lodging of a complaint. See note 124.

disposal to ensure public sector administrative decision-making is both just and fair and when it is not, that redress is easily accessible for all concerned.

Gregory Levine, former senior counsel of long-standing to the then named Ombudsman for British Columbia, and current Integrity Commissioner for two municipal governments in southwestern Ontario, states in relation to the Ombudsman's enabling legislation for British Columbia and Ontario: "These are codes of immense moral magnitude. They are inspiring statements of administrative justice and they constitute challenges to any ombudsman to be creative and concerned".<sup>231</sup> From Levine's vantage point this means the Ombuds must be aware of social context, willing to undertake investigations and report publicly when necessary. His observation is that reporting requirements and 'own motion' or self-initiated investigations both provide for an opportunity for Ombuds' activism. I would argue that these powers are also demonstrative of the high degree of structural independence enjoyed by the legislative Ombuds and is indicative of the impartiality expected of the appointee.

Approaching the investigation of complaints from a systemic perspective rather than simply dealing with each individual complaint on a 'one off' basis has also provided additional opportunity for Ombuds to contribute to greater administrative fairness and organizational effectiveness. Stephen Owen, former Ombudsman for the province of British Columbia, began to make use of this style of investigation in the 1980s after analyzing the work of his Office to determine how it contributed to the development of governmental administrative policy.<sup>232</sup> It is noteworthy that the majority of the Ombuds established by legislation have attracted a great deal of media attention locally, regionally,

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<sup>231</sup> Gregory J. Levine, "The Engaged Ombudsman – Morality and Activism in Attaining Administrative Justice" in Linda C. Reif, ed., *The International Ombudsman Yearbook* (Lieden/Boston: Marinus Nijhoff Publishers, 2004) at 137.

<sup>232</sup> Stephen Owen, "The Expanding Role of the Ombudsman in the Administrative State" (1990) 40 *University of Toronto Law Journal* at 675.

nationally and internationally when they issue their special and annual reports. In addition, the responses of the various government agencies, which have also been publicized, have demonstrated that these types of recommendations have had a profound impact by publicly illuminating mistakes made and providing recommendations that will clearly improve government administration, for all affected, in an expeditious manner. It is also worthy of comment that a government's rejection of an Ombuds report can also generate a great deal of positive media attention and greater public support for the Ombuds' view on how the matter in dispute should be resolved. For example, when the Minister of Defence, Peter Mackay, rejected the recommendation that military personnel should not be required to reimburse the government for sick leave pay given that the benefit was used as a result of employment related illness, media reports emphasized the fact that the National Defence and Canadian Forces Ombudsman's well-founded and reasonable recommendation had been rejected.<sup>233</sup>

In some instances, Ombuds also use their annual and special reports to comment on the accomplishments achieved by employees of both the public and private sector entities for which Ombuds have oversight. For instance, the Ombudsman for New Brunswick has gone a considerable step beyond clearing those impugned of unfair actions to providing awards of excellence for exemplary civil service based on the following criteria:

...providing exceptional responsiveness and co-operation during the complaint-resolution process; consistently demonstrating the values of administrative fairness and accountability; demonstrating leadership in informal problem-solving and helping ensure the efficient resolution of complaints; and encouraging the application of systemic and system-wide problem-solving.<sup>234</sup>

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<sup>233</sup> David Pugliese, "Military wants sick pay back" *The Vancouver Sun* (23 October 2012), online: Vancouver Sun <<http://vancouversun.com>>.

<sup>234</sup> Bernard Richard, "Annual Report 2009/2010 Ombudsman New Brunswick" at 11, online: New Brunswick Ombudsman <<http://www.gnb.ca>>.



The individuals selected were then acknowledged publicly for their work via ceremony and in print in Mr. Richard's 2009/2010 annual report. Similarly, the National Defence and Canadian Forces Ombudsman also publicizes its annual awards on its website for Canadian Forces personnel and family members who go beyond the call of duty to resolve problems informally and contribute to fairness.<sup>235</sup> Interestingly enough, no mention is made of how either Office will deal with complaints that arise at a later date related to these award winners' actions or omissions.

In order to demonstrate how 'own motion' or 'own initiative' investigations have been used to increase access to justice for many Canadians, particularly those who are disadvantaged, the following examples will illustrate the diverse ways that this form of Ombuds inquisitorial activity has been implemented. I examine two different models of Ombuds practice, and how these investigations have contributed to increased access to services and a higher level of fairness in the delivery of services in a number of different areas of public sector activity. The following case studies also demonstrate how important the principles of independence and impartiality are to the execution of these types of investigations.

#### OWN MOTION/OWN INITIATIVE INVESTIGATIONS Classical/Legislative/Parliamentary/Ombuds (Legislative Model)

An outstanding example of how an investigation initiated on an Ombuds 'own motion' was introduced and conducted is well represented in the Newfoundland and Labrador's Citizen's Representative's (the Representative) report entitled "Alone Among

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<sup>235</sup> "Award Recipients" online: Department of National Defence and Canadian Forces Ombudsman <<http://www.ombudsman.forces.gc.ca/com-mh/ar-lau/index-eng.asp>>.

the Few".<sup>236</sup> This report included five recommendations for significant improvements for the care and treatment of female inmates along with mechanisms for increased access to justice for those held in geographically isolated parts of the province. The genesis of this investigation is worthy of comment as it was sparked when the Representative, Mr. Lewis, read media reports about a female inmate who was forced to remain naked in her cell for a number of days due to concerns about her mental health.<sup>237</sup> Subsequently, two years later Mr. Lewis issued a press release<sup>238</sup> congratulating the government for allocating two million dollars for the construction of a facility for women and children in Happy Valley-Goose Bay. It is noteworthy that Mr. Lewis comments in his report that "Our office has never received a complaint from a female offender from Labrador."<sup>239</sup> As it is not unusual for individuals who are marginalized due to disability and/or poverty, racism or sexism (or for all of the foregoing reasons intertwined) not to complain, it is only due to the Representative's ability to carry out an investigation on his own initiative that some of the needs of this very vulnerable population were addressed.

By way of methodology, this five-month investigation was launched on the basis of written notice of the intent to investigate the availability of facilities and support services for female offenders in Labrador being provided to the Departments of Justice and Health and Community Services and a regional health authority. As the investigation progressed, another notice of intent to investigate the same matter was provided to a regional health authority and the Legal Aid Commission. In addition, meetings were held with or

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<sup>236</sup> Barry Lewis, "A Report on Facilities and Support For Female Offenders from Labrador Alone Among the Few" Office of the Citizen's Representative Province of Newfoundland and Labrador (June 2007) at 1, online: Citizen's Representative of Newfoundland and Labrador <<http://www.citizensrep.nl.ca>>.

<sup>237</sup> *Ibid.*

<sup>238</sup> Office of the Citizens' Representative for Newfoundland and Labrador, News Release/Communiqué, "Office of the Citizens' Representative - Commentary on Recent Infrastructure Spending Announcement" (19 February 2009), online: Citizens' Representative for Newfoundland and Labrador <<http://www.releases.gov.nl.ca>>.

<sup>239</sup> Lewis, *supra* note 236 at 4.

submissions were received from current and ex-offenders, various Status of Women councils, relevant government bodies and not-for-profit organizations. In addition, 1100 pages of text (including Court and Corrections and Community Services reports and United Nations standards) as well as photographic materials were analyzed by the three Investigators and one Senior Investigator who conducted the investigation. In addition, two trips were made from the Citizen's Representative urban office in St. John's, Newfoundland to various locations in Labrador. As is the norm with Ombuds' investigations a detailed investigative plan was prepared prior to the start of the investigation and amended as the investigation progressed.<sup>240</sup>

Referencing another vulnerable population, the then Manitoba Ombudsman Irene Hamilton released a lengthy report on the status of progress made towards implementing recommendations for a major overhaul of the child welfare system in a report entitled "Strengthen the Commitment: An External Review of the Child Welfare System". In introducing this progress report, Ms. Hamilton gave notice that she would be reporting annually on the implementation process of the recommendations that resulted in the government committing \$42,000,000 in short and long term funding after her report was originally tabled.<sup>241</sup> All of these investigations are consistent with Levine's admonitions that Ombuds are morally bound to use all of their powers to address injustices by being sufficiently engaged with and attentive to other means by which they may become aware of issues that require their review for fairness to prevail. Not surprisingly, the attendant publicity that the wide dissemination of these types of investigative reports by external media has generated along with the Ombuds' willingness to host on-line chats; to use

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<sup>240</sup> *Ibid.* at 5, 6.

<sup>241</sup> Ombudsman Manitoba, News Release/Communiqué, "Manitoba Ombudsman Reports on the Progress of Implementing Child Welfare Recommendations" (16 July 2008), online: <<http://www.ombudsman.mb.ca/news/jul15-08.htm>>.

Twitter and host Face book sites as well as making speeches about the scope of their work and attending community events regularly, has highlighted their investigative powers and their commitment to holding governments accountable for the manner in which they deliver government services. Similarly, investigations of this nature could not be successfully undertaken without the degree of structural independence that provides for Ombuds' control of procedures used, time lines followed, and how resources are allocated, as well as a commitment to and a public and governmental perception of impartiality.

#### OWN MOTION/OWN INITIATIVE INVESTIGATIONS Hybrid Ombuds

Hybrid Ombuds with own motion capacity and reporting requirements have also generated considerable change and access to justice through their investigative activities. For example, the Charter for the Fair Practices Commissioner states: "The Fair Practices Commissioner may, on his or her own initiative, investigate, identify and make recommendations on systemic issues within the WSIB [Workplace Safety and Insurance Board]." <sup>242</sup> By way of background, the Fair Practices Commission was established in 2003 as an Ombuds role to investigate complaints from employers and injured workers regarding the Ontario safe workplace and injured workers' compensation scheme. The above noted authority to initiate an investigation on her own motion was used by the Fair Practices Commissioner, a.k.a. the Workers Compensation Ombudsman, in 2006 to undertake a system-wide investigation into the processes used for making decisions about claims based on occupational diseases as in some instances the adjudication process

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<sup>242</sup> "Fair Practices Commission Charter Document" (2007), online: Fair Practices Commission <<http://www.fairpractices.on.ca>> at B(1)(b)

was taking more than six months to complete.<sup>243</sup> This lengthy time frame had generated complaints both about the emotional and financial consequences attributable to this waiting period as well as the impact of the lack of communication as to what was happening with the injured workers' cases. The methodology followed was that written notice was provided to the President of the WSIB indicating the investigation would focus on organizational performance rather than individual staff performance in the areas of decision-making processes, communication and timeliness. The Commissioner's office initially identified a sample of statistically valid claims that were still in process after six months had elapsed to determine if the complaints being received were indicative of a widespread problem. In addition, the Commission staff reviewed statistics and data on the claims in the sample as well the information obtained from conducting a random file review; and discussed the reports on file as well as interviewing the staff and managerial personnel in the Occupational Disease Unit. The Commission staff also met with other stakeholders including some union representatives and the Directors of the Offices of the Worker Advisor and Employer Advisor whose offices are in place to provide advice and support to employers and injured workers respectively.

A seven-month investigation was concluded with a final report being issued after the WSIB President provided her written response to the Commissioner's preliminary findings and resultant recommendations.<sup>244</sup> In brief, the Commissioner, Laura Bradbury, concluded that the time frame for decision-making was too long and that the impact of the resultant delay on injured workers had to be given more consideration within the WSIB's

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<sup>243</sup> "Fair Practices Commission Annual Report for 2006-2007" at 8, online: Fair Practices Commission <<http://www.fairpractices.on.ca>>.

<sup>244</sup> *Ibid.* at 9.

model of adjudication.<sup>245</sup> Ten recommendations were made which were accepted in full by the WSIB in 2007 and which by 2008 had resulted in increased staff resources; a new comprehensive database which allows for easier tracking of data; a pilot project being initiated which included two specialized back log teams to deal with claims over six months old; new means for measuring accountability; new training resources; as well as a model for delivery of service that emphasized a customized approach.<sup>246</sup>

A very important aspect of this investigation, and many that are conducted by Ombuds in all sectors, is the commitment to and authority for follow-up on the fulfillment of accepted recommendations. In this situation, the Commissioner received bi-monthly reports on the progress made over the following year and met regularly with leadership from within the Occupational Disease Services Division. In 2008, two years after initiating her investigation, the Commissioner indicated in a summary report that as a result of the progress made by the WSIB that the complaints to her office about occupational disease claims had been reduced by almost half and that the back log of cases held by WSIB that were more than six months old had decreased substantially.<sup>247</sup> Three more years later in April of 2011, the Commissioner stated that the number of complaints in the area of occupational disease claims has been reduced by 75% and there is no backlog.<sup>248</sup> These data demonstrate how an own motion investigation had a profoundly positive effect on the injured workers whose claims are now being processed in a more customized and timely manner. In addition, the staff of WSIB has benefited from training and the implementation of a new model for service delivery that has increased their capacity to handle

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<sup>245</sup> *Ibid.*

<sup>246</sup> Laura Bradbury, "Fair Practices Commission 2008 Annual Report" at 5,6, online: Fair Practices Commission <<http://www.fairpractices.on.ca>>.

<sup>247</sup> *Ibid.*

<sup>248</sup> Conversation with Laura Bradbury, Fair Practices Commissioner (25 April 2011).

occupational disease claims in a timely and effective manner. Such an investigation could not have been undertaken without a high degree of structural independence allowing for: 1) the ability to determine an investigative process appropriate to the circumstances and 2) the ability to allocate sufficient resources to complete the review in a timely manner. Similarly, it is unlikely that the investigation could have been completely as quickly as it was and with as high a degree of cooperation from the respondent, if the approach taken had not been perceived to be constructive (rather than punitive) as well as both impartial and independent.

#### INVESTIGATIONS RESULTING FROM AN INDIVIDUAL COMPLAINT Legislative Model

Ombuds undertaking thousands of individual investigations, on an annual basis, across Canada has also resulted in life-changing outcomes for particular complainants. For example, the Ombudsman for Saskatchewan determined through an investigation that an individual should be reimbursed for the \$59,000 he spent paying for medical treatment he received in the U.S. related to the removal of a brain tumour.<sup>249</sup> This complainant sought medical assistance in the U.S. as he had not been able to obtain a definitive diagnosis as to his condition in his consultations with various Saskatchewan physicians. While the Ombudsman indicated the criteria used by the government to assess the claim were valid, and it was not reasonable for this individual to expect a response to his request for coverage so quickly, (e.g. one day in advance of the prescribed surgery), he was still recommending the costs be reimbursed by the government. The Ombudsman's rationale for doing so was that the government had communicated its decision to deny the complainant's request for payment as the treatment he sought was available in

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<sup>249</sup> Kevin Fenwick, "Ombudsman Saskatchewan Recommendations 2010 Third Quarter Report Update" ( July – September 2010) at 2, 3 online: Ombudsman Saskatchewan <<http://www.ombudsman.sk.ca>>.

Saskatchewan, via fax to his home and in a voice mail message when it knew the complainant was not at home. In fact, the complainant had corresponded with Ministry staff to advise that he had travelled to the U.S. and was in the process of being prepared for the surgical procedure at the heart of the complaint. In this instance, the administrators of this program did not accept the Ombudsman's recommendation. However, the Minister responsible for this department overturned this decision and indicated the payment would be made as he accepted the Ombudsman's rationale as being reasonable given the communication difficulties and the special circumstances.<sup>250</sup> This type of individual investigation is conducted quickly and involves the review of relevant legislation, policy and procedure as well as interviews with key personnel and is conducted in a manner solely determined by the Ombuds. In addition, the recommendation made and the resolution achieved applies only to the individual complainant whose concern was investigated.

Another example of how individual concerns can be investigated is evident from a report prepared by the Ombudsman for the Yukon Territory in 2010 as a result of several complaints from citizens about a regularly scheduled territorial health care insurance survey. The Ombudsman found that this survey, which was significant in scope and potential impact as it was conducted twice a year (and had been handled this way for many years), had been implemented in such a fashion that the government breached its own legislation, that is *The Statistics Act*. The government had done so by collecting and sharing personal information in a manner that was not consistent with the legislation and by advising the 5113 recipients of the survey that if they did not complete the so called

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<sup>250</sup> James Wood "Gov't overrules ministry decision not to fund man's U.S. surgery" (04 February 2011) *The Star Phoenix* online: Canada.com <<http://www2.canada.com>>.



'voluntary' survey their health insurance could be cancelled.<sup>251</sup> While the Ombudsman recognized the effort to collect information was well intentioned, served useful purposes, and that the same wording had been used for previous surveys, she also had to point out that the approach taken was contrary to the government's own legislation. It was also noted by the Ombudsman that the government was not appreciating the import of its actions when it indicated that "...only a small group of people..."<sup>252</sup> was inconvenienced by having their health care insurance cancelled and then reinstated. In response, the government was advised by the Ombudsman that the use of a threat to encourage cooperation with this data collection effort when the legislation did not allow for such action was unacceptable. The government accepted the Ombudsman's recommendations for the proper conduct of future surveys and for communicating with those residents whose health care insurance coverage was cancelled on how to have the coverage reinstated on a retroactive basis.<sup>253</sup> In this legislative regime, the *Ombudsman Act*<sup>254</sup> provides a comparable methodology to that cited earlier in that it requires the Ombudsman to give notice of her intent to investigate a matter to the relevant authority and have unfettered access to facilities, files and personnel. She also has the responsibility to advise the authority whose work is being investigated if her investigation results may be of an adverse nature before she finalizes her report so that the authority has the opportunity to make submissions verbally or in writing prior to the final report being issued. This requirement, as noted earlier, rather than compromising independence and impartiality

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<sup>251</sup> Tracy-Ann McPhee, "Report after Investigation Ombudsman Act section 31(2) December 6, 2010 Re: Complaints to the Ombudsman – Health Care Insurance Survey Authorities: Health and Social Services; and Yukon Bureau of Statistics" at 1 online: Yukon Ombudsman <<http://www.ombudsman.yk.ca>>.

<sup>252</sup> *Ibid.* at 3.

<sup>253</sup> *Ibid.* at 4.

<sup>254</sup> Chapter 63 *Ombudsman Act* Y.1996, online: Yukon Territory <<http://www.gov.yk.ca>> at 15(1), 16(1), 17.

provides a means for the respondent to provide input in order to correct any factual errors or misunderstandings

### ADDRESSING SYSTEMIC/SYSTEM-WIDE CONCERNS

As the mission of an Ombuds on a general basis is to contribute to a higher level of fairness in administrative regimes, the use of investigations to inquire into systemic or system-wide concerns, whether they are initiated on an own motion basis or in response to an individual complaint, is also deserving of particular attention. Examples of how systemic concerns have been addressed in the province of Ontario, since 2005, can be found in the 33 (as of May 2012) Special Operations Response Team (SORT) investigations, reported on by André Marin.<sup>255</sup> The SORT style of investigation is undertaken when the issues under review are complex, sensitive and serious in nature and of interest to many people; when an informal resolution is unlikely; and/or when the implications of the issues raised or observed are potentially far-reaching and systemic.<sup>256</sup> Typically, a team of investigators is brought together for the express purpose of completing in-depth reviews in an expeditious manner. Frequently, interviews with witnesses are audio taped and then transcribed to ensure accuracy. The foci of Mr. Marin's reports range from the rules around parental custody of children with special needs and eligibility for appropriate forms of residential care, to questioning the governmental restrictions on the use of Avastin, a cancer treatment drug, to the transparency of property assessment methods to the use of advertising for promoting private colleges' programs, etc.<sup>257</sup>

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<sup>255</sup> "SORT INVESTIGATIONS", online: Ombudsman Ontario <<http://www.ombudsman.on.ca>>.

<sup>256</sup> "Special Ombudsman Response Team", online: Ombudsman Ontario <<http://www.ombudsman.on.ca>> at "Investigations".

<sup>257</sup> "SORT INVESTIGATIONS" *supra* note 255.

Mr. Marin's investigation of the origin and subsequent communication of the controversial security regulation (Regulation 233/10) passed by the province prior to the G20 summit held in Toronto in June 2010 culminating in his report entitled "Caught in the Act" deserves more in-depth attention. In this undertaking Marin employed particularly innovative investigative techniques. The investigative focus was the involvement of the Ministry of Community Safety and Correctional Services in the origin of Regulation 233/10 and the communication of the regulation to police, media and the public.<sup>258</sup> In this instance, seven investigators and two early resolution officers rolled out their investigation in the usual fashion by conducting structured interviews; reviewing text provided by the Ministry; researching what had taken place at summit meetings that had been hosted elsewhere; visiting physical locations and speaking with individuals in the area.<sup>259</sup> The investigative innovation can be seen in their use of social media like YouTube, blogs, podcasts and Face book to gather additional information. Using this approach, the investigators were able to identify in excess of 5000 videos related to the G20 activities. In addition, the Ombudsman communicated with individuals via Twitter to ask them to contact his Office if they had information relevant to the issues being investigated.<sup>260</sup> The volume and variety of materials acquired and witness accounts received demonstrated how traditional investigative approaches can be enhanced by the use of social media.

Another example of how an Ombuds' investigation on a systemic matter can be conducted is found in the work of the Protecteur du citoyen/Ombudsman for Québec Raymonde Saint-Germain. In October 2009, her Office tabled a report with the Québec

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<sup>258</sup> André Marin, "Investigation into The Ministry of Community Safety and Correctional Services' conduct in relation to Ontario Regulation 233/10 under the Public Works Protection Act "Caught in the Act" (December 2010) online: Ombudsman Ontario <<http://www.ombudsman.on.ca>>.

<sup>259</sup> *Ibid.* at 39.

<sup>260</sup> *Ibid.* at 40.

National Assembly on its investigation of the quality of government services for children with pervasive developmental disorders (PDDs). In this instance the methodology used was a survey approach whereby one survey was distributed to 150 parents of children with PDDs and another survey was distributed to 13 local bodies responsible for handling complaints from rehabilitation centres for people with intellectual disabilities and developmental disorders.<sup>261</sup> In addition, 167 people including parents, practitioners and those responsible for managing services participated in interviews or focus groups. This approach was taken so as to be able to examine and document the experience of parents seeking services for their children from the point of first indicators of concern to the time the child was seven years of age or had completed the first grade. In this instance, the three ministries and their agencies responsible for providing support, funding and care for children with PDDs accepted all 21 recommendations that resulted from the Protecteur du Citoyen/Ombudsman's investigation.<sup>262</sup>

In yet another area of considerable public import, the Ombudsperson for British Columbia, Kim Carter, released a report entitled "Fit to Drink: Challenges in Providing Safe Drinking Water in British Columbia (2008)" in which she provided 39 recommendations on how various governmental bodies could improve on the safety of drinking water. All of the recommendations were accepted and are in the process of being implemented. Similarly, then Ombudsman for New Brunswick, Bernard Richard, released a report in June 2008 on the Minister of Education's decision to modify French Second Language Curriculum in which he outlined serious deficits in the Minister's approach. He also released a report

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<sup>261</sup> Raymonde Saint-Germain, "Looking Towards Greater Continuity in Service Delivery, Approaches and Human Relations" Special Ombudsman's Report on Government Services for Children with Pervasive Developmental Disorders", (October 2009) at 7, 8,

online: Le Protecteur du citoyen <<https://www.protecteurducitoyen.qc.ca>>.

<sup>262</sup> Press Release # 161 online: Le Protecteur du citoyen <<http://www.protecteurducitoyen.qc.ca>>.

entitled "Residential Property Assessment Appeal Process in New Brunswick: Levelling the Playing Field" in June 2008 in which he concluded that there was a pressing need for the government to make the information it used to determine assessed values for properties accessible to the public and to improve the appeal process.<sup>263</sup>

In the same tradition, then Ombudsman for Alberta, Gord Button, issued a report in May 2009 entitled "Prescription for Fairness" dedicated to reporting on an investigation undertaken to look at the government's handling of requests for payment for out-of-country medical care. The majority of his 53 recommendations were accepted as stated, or in principle.<sup>264</sup> The Ombudsman for Saskatchewan, Kevin Fenwick, released a special report titled "My Brother's Keeper"<sup>265</sup> in which he reported on the outcome of his review of the introduction of Electronic Control Devices (ECD), commonly known as Tasers, into all Saskatchewan correctional centres. In this instance the Ombudsman found that the use of a Taser in one specific incident was consistent with the guidelines for use. However, the Taser had been used on an inmate *prior* to the government authorizing the actual use of this technology. The outcomes of the foregoing reviews demonstrate the wisdom of addressing complaints from a systemic perspective, as first articulated by Stephen Owen in the 1980s,<sup>266</sup> whenever possible so as to increase access to justice for all who may be affected by a systemic or system-wide fault.

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<sup>263</sup> Bernard Richard, "Residential Property Assessment Appeal Process in New Brunswick: Levelling the Playing Field" (2008) Ombudsman New Brunswick online: Ombudsman New Brunswick <<http://www.gnb.ca>>.

<sup>264</sup> Alberta Ombudsman, News Release/Communiqué, 07-20-2009, "Ombudsman receives response to Prescription for Fairness" (20 July 2009) online: Alberta Ombudsman <<http://www.ombudsman.ab.ca>>.

<sup>265</sup> Saskatchewan Ombudsman, News Release/Communiqué, 2008-07-29, "OMBUDSMAN SAYS GOVERNMENT HAS WORK TO DO IF IT PLANS TO INTRODUCE ELECTRONIC CONTROL DEVICES INTO ADULT MALE CORRECTIONAL CENTRE" (29 July 2008) <<http://www.ombudsman.sk.ca>>.

<sup>266</sup> Owen, *supra* note 232.

## INVESTIGATION RESULTING FROM AN INDIVIDUAL COMPLAINT Hybrid Model

An example of an investigation undertaken by an academic Ombuds on the basis of an individual complaint is captured in a case reported on by then Ombudsperson, Hervé Depow, for Algonquin College in Ottawa, Ontario in 2008/2009. In this instance, an investigation was undertaken in response to a student's complaint that her professor had not graded her fairly.<sup>267</sup> Initially, the Ombudsperson encouraged the student to familiarize herself with the policy governing her situation and then to meet with her professor so as to better understand why she had received a zero for an assignment. A meeting was held and as the student remained dissatisfied she formally appealed the grade of zero following the College's standard appeal process. The appeal was not successful and the student believed the review process was handled unfairly so she asked the Ombudsman to investigate as a last resort. As the student had exhausted the College's appeal process and was alleging the process had not been conducted fairly, the Ombudsman met with the Chair of the Committee who had heard the student's appeal and reviewed the process followed and the material submitted by both the professor and the student. Through the Ombudsperson's review of the professor's submission it became apparent that the Professor was not complying with the directive in place for how any changes to the previously circulated information on evaluation of assignments was to be conducted. As a result, the Ombudsperson recommended that the Appeal Committee, which had originally denied the student's appeal, be reconvened to review the complaint taking into account the course outline, the directions for completing assignments, the evaluation criteria for the assignment in question and how the Professor had determined the mark for this particular

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<sup>267</sup> Hervé Depow, "Office of the Ombudsperson Annual Report 2008 to 2009" Case 5 at 7,8, online: Algonquin College Ombudsperson <<http://www.algonquincollege.com>>.

student. The Committee reconvened and the Ombudsperson was invited to attend and meet with the Professor. Subsequently, the Professor agreed to review the grade assigned (which resulted in the grade moving from a zero to a passing grade) and to review his evaluation methods in relation to the College's directives on this subject. Through this investigation an individual unfairness was corrected, without the student having to invoke an external judicial review of the grade appeal process, and the likelihood of a comparable problem occurring again for other students was reduced. It is important to recognize that the methodology used in this case is common to a hybrid Ombuds approach for an individual matter whereby notice to investigate is generally provided verbally rather than in writing and the conclusions and recommendations are often issued verbally as well. In addition, the investigation, which is undertaken on an impartial and independent basis, is completed in a short time period rather than extending over weeks and months and as is the norm for an Ombuds process, the methodology used is determined solely by the Ombuds.

Many bank Ombudsman who respond to client complaints also have the authority to investigate individual complaints. For example, the Canadian Imperial Bank of Commerce's website on complaint resolution indicates that if a customer is not able to resolve a concern with a local branch or office or the central 'customer care' service, the client can bring the concern to the attention of the Ombudsman for "...a thorough investigation".<sup>268</sup> Similarly, the mandate for the TD Bank Financial Group Ombudsman includes the authority to "...conduct an independent review of customer concerns that remain unresolved"<sup>269</sup> as well as being identified as an intermediary between individual

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<sup>268</sup> Canadian Imperial Bank of Commerce online: <<http://www.cibc.com/ca/cibc-and-you/to-our-customers/service-commitment/resolving-complaints>>.

<sup>269</sup> TD Bank Financial Group online: <<http://www.td.com/ombudsman.jsp>>.

and small business clients and TD Bank and its subsidiaries. In addition, the majority of banking Ombudsman websites advertises that customers who are not satisfied with their interaction with a particular bank Ombudsman can escalate their complaint to the attention of the Ombudsman for Banking Services and Investments (OBSI).<sup>270</sup>

It is worthy of reiterating that the banking Ombuds who respond to client complaints are structured quite differently than those who respond to employees' concerns. Specifically, the Ombuds who receive employee complaints operate within the organizational model of practice which does not include an investigative mandate. As a result, within the same corporate body, both a hybrid and an organizational model of Ombuds practice have been established for use by different constituencies. This evolution demonstrates again the idiosyncrasy of the Ombuds' mandate depending on how and when and by whom the role was established.

In addition, the Canadian Broadcasting Corporation's (CBC) Ombudsman website indicates under its statement of principles that: "The Ombudsman is completely independent of CBC program staff and management, reporting directly to the President of the CBC and, through the President to the Corporation's Board of Directors".<sup>271</sup> This configuration could suggest that this role falls into the organizational Ombuds category. However, other components of the CBC Ombudsman's mandate indicate otherwise. For example, it is mandated that this Ombudsman will evaluate whether a piece of journalism or a broadcast complained about violated the CBC requirement that all journalistic activity must demonstrate accuracy, integrity and fairness. In addition, reference is made to the responsibility for fact finding as part of the Ombudsman's review process. As well, this

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<sup>270</sup> For more information on this organization see online: Ombudsman for Banking Services and Investment <<http://www.obsi.ca>>.

<sup>271</sup> The Office of the Ombudsman online: The Canadian Broadcasting Corporation (CBC) <<http://www.cbc.ca/ombudsman/page/mandate.html>>.



Ombuds role provides explicitly for the ability for the Ombudsman to publish reports on specific cases that he has determined to be particularly noteworthy or consequential not only within the CBC and to the complainant(s) but to the general public as well.

It must also be recognized that in the course of investigation whether it be conducted by a legislative or hybrid Ombuds, it will be found that the governmental agency or institution has not made an error and the Ombuds has determined that the decision complained about has been made fairly. While these decisions do not receive the same amount of media attention as reports indicating that a department or agency is rife with serious administrative errors or illegalities, acknowledgments of effective administration are routinely found in the annual reports of legislative Ombudsman and, as noted by Chief Justice Dickson, can boost the morale of government administrators.<sup>272</sup>

#### EARLY RESOLUTION TECHNIQUES

##### Legislative and Hybrid Models

It is also important to be mindful of the fact that in addition to in-depth investigative activity, all legislative and hybrid Ombudsman Offices receive, in totality, literally thousands of complaints annually that are handled outside of the investigative process. For instance, in the 2009/2010 annual report of the Ombudsman for Ontario it is stated that of the 13,894 complaints handled, (8035 within jurisdiction) 780 were resolved with the Office's intervention and 5,206 were handled via "inquiry made/referral given/resolution facilitated".<sup>273</sup> Similarly, the City of Toronto Ombudsman noted in her 2009/2010 annual report that of the 1562 complaints received, 1525 were dealt with using 'early resolution' techniques; 9 cases were investigated and 2 investigations were still in progress.<sup>274</sup> Due to the size of the jurisdiction and the sheer volume of complaints, in some instances, the

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<sup>272</sup> *Ombudsman*, *supra* note 209

<sup>273</sup> André Marin, Ombudsman Ontario Annual Report 2009/2010 at 76, online: <<http://www.ombudsman.on.ca>>.

<sup>274</sup> Fiona Crean, Toronto Ombudsman Annual Report 2010 at 34, online: <<http://ombudstoronto.ca>>.

Ombuds Office may use a clearing house (or call centre) format whereby calls, emails, faxes and letters are received and then 'triaged' by skilled information and referral staff.

For obvious reasons, the first priority regardless of whether the Ombuds Office is a sole proprietor or has dozens of staff, is to determine whether the matter raised is within the jurisdiction of the Office. Typically those complaints falling outside of the Ombuds' jurisdiction are closed with the provision of a well-informed referral. For those that are within jurisdiction, the vast majority of complaints received by both legislative and hybrid Ombuds are handled via early resolution techniques which include: inquiries for the purpose of clarification; shuttle diplomacy<sup>275</sup>, mediation and conflict coaching. Stephen Owen, former Ombudsman for the Province of British Columbia, who addressed the importance of expanding upon the traditional investigative approach opined:

In keeping with the general principle that it is the proper role of an ombudsman office to strive for the mutually acceptable resolution of a problem rather than necessarily finding a fault or absence of it, the office should attempt to provide informal mediation services wherever such an approach may be productive. This approach not only tends to result in greater satisfaction among all parties, but frequently provides a more rapid resolution than a full investigation oriented towards a finding of right or wrong.<sup>276</sup>

Some current legislative Ombudsman Offices have adopted the same posture. For example, the Québec Ombudsman/Le Protecteur du citoyen describes her role on the home page for the Office as "A neutral and independent mediator/Un médiateur neutre et indépendant".<sup>277</sup> A similar approach is used by the Ombudsman for Saskatchewan (Kevin Fenwick) who noted on the cover of his 2006 annual report:

- We are Fair, Independent, Impartial
- What we do: Negotiate, Investigate, **Mediate**

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<sup>275</sup> Shuttle diplomacy in the Ombuds context involves the Ombuds or staff member conveying information from the complainant to the respondent and vice versa in a fashion that results in more effective communication between the two parties.

<sup>276</sup> Owen, *supra* note 50 at 55.

<sup>277</sup> Le Protecteur du citoyen/The Québec Ombudsman online: <<http://www.protecteurducitoyen.qc.ca>> (English) and <<http://www.protecteurducitoyen.qc.ca>>. (French)>.

- Has Government Been Fair? <sup>278</sup>

A senior employee, Acting Deputy Ombudsman at the time, Ms. Renée Gavigan, advised that in the early years of this century the government of Saskatchewan amended the *Ombudsman Act* to include provision for mediation as well as investigation. The Office then developed a process known as alternative case resolution (ACR) which includes mediation, negotiation, facilitation and coaching. Using the ACR approach, a case analyst identifies whether or not a complaint is suitable for mediation using the following criteria: 1) the complainant is concerned about the relationship deteriorating; 2) the complainant wants to better understand how a decision was made or why it was made; 3) the complainant indicates that he hasn't felt heard by the government in that he feels he's hit a wall and can't communicate with them in a productive way; 4) the complainant expects to have an ongoing relationship with an administrator or department and wants to maintain or improve the quality of the relationship; or 5) 'urgent' cases that would normally be investigated, but given how long the process could take using that route the outcome would be rendered 'academic'. If the issue presented meets one or more of the above criteria, the staff will canvass the parties to see if an ACR process may be acceptable to all involved. If the parties are amenable to proceeding with mediation they are reminded that the Ombudsman retains the right to evaluate any settlements reached to determine if they are fair to the public overall. Ms. Gavigan emphasized that:

As mediators/facilitators our job is to encourage the parties to be creative in coming up with solutions that best meet their individual circumstances. We wouldn't support an agreement that didn't meet basic fairness standards, as mediators we use the fairness lens to assist the parties in developing a solid agreement.<sup>279</sup>

<sup>278</sup> Kevin Fenwick, Annual Report 2006 Ombudsman Saskatchewan online: <<http://www.ombudsman.sk.ca>>. The bolding of the term 'Mediate' is my emphasis.

<sup>279</sup> Interview of Renée Gavigan, Acting Deputy Ombudsman/Ombudsman Assistant by Nora Farrell in April 2007 for preparation of workshop delivered at Forum of Canadian Ombudsman conference held in Montreal, April 2007 for a workshop entitled "Should Ombuds mediate?"

Interestingly enough, as early as 1975, the Alberta Ombudsman at the time, Dr. Ivany, described two scenarios in his annual report where he served as what he described as “a catalyst in the relations between the individual and society”.<sup>280</sup> He fulfilled this role, in one instance, by organizing a meeting that assisted native fire fighters to bring their claims of discriminatory ways of thinking to the attention of senior governmental personnel.<sup>281</sup> Another example of the use of a mediated approach is the situation reported whereby an Ombuds staff met with a farmer who was complaining about flooding and erosion of his land due to an alleged governmental action. Through discussion with government personnel who were also on site for the Ombudsman staff visit and the farmer, a mutually acceptable solution was found.<sup>282</sup>

Geoffrey Wallace, a former University Ombuds in an American university, provides additional fodder for determining how the role of an Ombuds should be implemented as it relates to the use of dispute resolution techniques other than an investigative approach. In 1993 he observed that the Ombuds role in some universities in the U.S. in recent years had mutated into what could more accurately be called the ‘University Mediator’. He noted “The major benefit [of the mutation] is that the Ombudsman, instead of taking on the task of the complaint, may simply put disputants together and act as if they are neutral with regard to the outcomes”.<sup>283</sup> He posits in a similar vein to Levine (2004), Marin (2007) and Rowat (1985, 2007) that taking this approach does a disservice to the role and the university community. Specifically, Wallace says “The University Mediator would certainly

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<sup>280</sup> Lundvik, *supra* note 45 at 49.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> Geoffrey Wallace, “Recent Role Variations in the Ombudsman in Education”, online: (1993) California Caucus of College and University Ombuds Association. UCI Ombudsman: The Journal 10 at 2  
<<http://www.ombuds.uci.edu/JOURNALS/1993/variations.html>>.

have a neutral position, but they would not fulfill the fairness role that defines the role and function of the ombudsman".<sup>284</sup> This explanation highlights the belief that an Ombuds, regardless of where she is situated, always has a responsibility to address issues of fairness and equity from an institutional or community perspective even if the parties in dispute are only interested in their needs and the quality of their relationship. While Wallace's frame of reference is American post secondary institutions, his admonition is instructive to Ombuds in other settings well as other jurisdictions as whenever an Ombuds, wherever he or she is located, serves as a mediator she maintains a professional and moral responsibility for expecting that both substantive and procedural fairness standards are met in this context as well.

Michael Mills, former long standing Ombudsman for the City of Portland, Oregon also articulates the primacy of the notion of an Ombuds being an 'advocate for fairness' rather than simply mediating disputes in a compelling manner:

The ombudsman's role of advocacy becomes evident after the facts are known and the conclusion begins to gel. While the mediator strives to achieve a resolution the parties can accept, the ombudsman is more often faced with advocating for a solution which he or she believes to be the most fair and equitable even though it may not be completely acceptable to both parties.<sup>285</sup>

This kind of caution reinforces the importance of the principles of independence and impartiality that require the Ombuds to move beyond the sole pursuit of client satisfaction to determining what is appropriate given the circumstances. Hence, Ombuds wherever they are located and however they choose to do their work, are mindful when using early resolution processes that they are not in place to facilitate a quick fix for one or two

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<sup>284</sup> *Ibid.*

<sup>285</sup> Michael Mills, "Mediation Vs. Ombudsmanny", (no date available). I contacted Mr. Mills who was the Ombudsman for the City of Portland, Oregon to ascertain where the article I have in hard copy was published and when. Unfortunately he can not locate this information.

individuals but rather to contribute to a fair, enduring and timely resolution of complaints both of an individual and systemic nature.

While the foregoing material has been dedicated to how legislative and hybrid Ombuds implement their investigative and early resolution mandates, it is important to recognize that as another indicator of the degree of their structural independence, Ombuds typically have means at their disposal which allow them to refuse to investigate or take up a matter. For example, Section 17 of the *Ombudsman Act* for Ontario states that if there is an adequate remedy that the complainant has not made use of or having looked at the case in its entirety the Ombudsman (and this authority is delegated to various staff as well) has the discretion to refuse to investigate further. Not surprisingly, Ombuds legislation generally requires that a decision to reject a complaint and the rationale for doing so be provided to the complainant in writing.

Similarly, hybrid Ombuds also have the authority to refuse to take up a complaint on the basis that it is considered to be frivolous or vexatious. Typically the same expectation for providing a written rationale (on either a request or *pro forma* basis) for refusing to accept the complaint is also required. In the same tradition, organizational Ombuds often have the ability to state they do not think it is appropriate to become involved in the discussion of some matters. In order for complainants to accept such an action as being fair, in all three models of practice, there must be a clear demonstration and perception of impartiality. The traditional ability of the Ombuds to independently determine what is the appropriate approach for handling a matter is also well represented in the diversity of techniques used and the time frames evident in the use of early resolution modalities for resolving complaints lodged with either a legislative or hybrid Ombuds.

### Organizational Ombuds Model

The daily fare of organizational Ombuds which is the resolution of complaints on the basis of what other Ombuds models would call 'early resolution' activities like the provision of advice, making inquiries, mediation, shuttle diplomacy, mediation, fact-finding exercises and coaching is complemented by the regular analysis of trends to identify potential systemic or system-wide problems. However, there is an overarching issue that must be addressed in conjunction with the analysis of the category of Ombuds' practice. It is important to acknowledge that there are respected political scientists and ombuds practitioners who believe that any Ombuds role which is not established by legislation is more properly referred to as a 'Wannabe' Ombudsmen<sup>286</sup>, or a pseudo or quasi Ombuds. In this vein, the current Ombudsman for Ontario (André Marin) asked this provocative query in a keynote address to the attendees of the 27<sup>th</sup> Annual Conference of the United States Ombudsman Association speech:

Do you wonder why the private sector is awash with positions that masquerade as Ombudsmen, when these positions may more accurately be described as extensions of their human resources or customer relations department? Simply, it is because of the vast amount of goodwill that the word Ombudsman conjures in the minds of the public. ...As originally conceived, the Ombudsman was meant to challenge, not cower, to speak out, not whisper and to lead, not follow. An Ombudsman was meant from the get-go to be a powerful agent of change.<sup>287</sup>

However, though, in my experience, observation and review of organizational Ombuds' activities, Marin's (2007) and Hill's (1997) characterizations of the non-legislative Ombuds, located in the private sector, are not necessarily consistent with how they actually operate in practice in Canada. For example, then Corporate Ombudsman/Protectrice de la

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<sup>286</sup> This term was introduced by Larry B. Hill in 1997, a Professor of Political Science, in an address to the Administrative Law and Regulatory Practice Section of the American Bar Association in a speech and subsequent article entitled: American Ombudsmen and Others; or, American Ombudsmen and 'Wannabe' Ombudsmen.

<sup>287</sup> André Marin, "Innovate or Perish" (2007) 20 Canadian Journal of Administrative Law and Practice at 105.

personne for Hydro- Québec, Justine Sentenne, indicated in her 2009 Annual Report that of 148 cases settled, 15 had been mediated by the Ombudsman; 28 by the provision of advice or counsel and 21 by referral to the appropriate authority.<sup>288</sup> In this time period complaints were raised in a number of important areas such as discrimination, harassment and job status. These areas of concern which were identified publicly, rather than being 'whispered', were successfully settled with the assistance of this Ombudsman. As a result of her discussions and interventions, in fulfilling her role as a change agent, the Corporate Ombudsman/Protectrice de la personne made two philosophical recommendations in her annual report that are indicative of leading rather than cowering. Specifically she commented on how the corporation could ensure a strong work ethic continued within the company by suggesting an increased focus on human dignity and respect for improving the work atmosphere. She also recommended the establishment of standards and guidelines for the efficient use of voice mail. In addition, praise was given to the corporation for its compassionate approach to accommodating employees who also serve as caregivers in demanding family situations and she expressed hope that the underlying value of compassion would be evident in the future.

While the Corporate Ombudsman/Protectrice de la personne for Hydro- Québec's annual report is posted on the company website and distributed widely in a hard copy format, many organizational Ombuds do not report publicly. Instead, their confidential reports summarize trends and issues and provide aggregated complaint data that are then provided to senior management for use in determining how to address systemic issues. In addition, organizational Ombuds are often asked to provide their insight and advice on how trends which are cause for concern should be best addressed.

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<sup>288</sup> Justine Sentenne, "Report of Activities of the Corporate Ombudsman 2009 Hydro- Québec" at 3, online: Hydro Québec <<http://www.hydroquebec.com>>.



In light of the foregoing discussion it is worthwhile to know that Canadian Ombuds scholar, Donald C. Rowat held the view that ombuds roles not founded by legislation should be described as 'internal Ombudsmen'. While I support the importance of distinguishing the type of Ombuds roles that have been established in a wide variety of different locations in many different ways, so as to ensure that users know what to expect when they approach them, I believe the use of 'internal Ombudsman' may unintentionally convey the notion that this type Ombuds is neither independent nor impartial when in fact it may exemplify very high standards in these area. For instance, due to the culture of the organization, the quality of the policy or terms of reference or charter coupled with the Ombud's personal credibility, while the role may not be configured so as to be as structurally independent as a legislated Ombuds, the incumbent may be perceived as operating at the same level, by virtue of her demonstrated capacity to 'speak truth to power'.

The policy statement issued by the Australian and New Zealand Ombudsman Association (ANZOA) is instructive as well in articulating its opinion on the criteria which are essential for indicating that an entity is entitled to be called an 'ombudsman'. Specifically, it is stated that it is oxymoronic or contradictory to use such a term as 'internal ombudsman' as this terminology indicates that the ombudsman is actually directed by an industrial organization or governmental official.<sup>289</sup> As a result, the identification of the type of ombuds role should be based on an examination of not only on how it was established and the powers that it has in place but also on how it is implemented. For instance, annual and special reports, the Ombuds promotional material as well as observation of the Ombuds' practice are useful means for determining both the independence of the Office

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<sup>289</sup> Australian and New Zealand Ombudsman Association (ANZOA), Media Release, "Essential Criteria for Describing a Body as an Ombudsman" (18 May 2010), online: ANZOA < <http://www.anzoa.com.au> >.

and the impartiality of the incumbent. Given how important perception is to the proper implementation of the role of Ombuds, I concur with ANZOA that the use of the descriptor of 'internal' in concert with Ombuds is never appropriate as it clashes with and undermines the traditional understanding of and the commonly stated expectations for independence and impartiality associated with this role.

As noted previously, early resolution techniques are 'the bread and butter' of many Ombuds roles and are a regularly used complement to the investigative activities undertaken by both legislative and hybrid Ombuds. The authority that allows for the organizational Ombuds to select whatever form of dispute resolution assistance he deems to be appropriate to the situation is also representative of the independence inherent to the organizational Ombuds role.

#### ACCESSIBILITY AS IT APPLIES TO ALL TYPES OF OMBUDS

##### (Legislative, Hybrid, Organizational)

A key defining characteristic of an Ombuds role, which is by definition an alternative to the traditional dispute resolution system, should be the ease with which its services can be accessed and used. As noted by Chief Justice Dickson, Ombuds services are "...free and available to all."<sup>290</sup> Therefore, in order for an Ombuds Office to be effective, knowledge of its existence and how it functions should be wide-spread. Hence, many Ombuds roles in all models of practice place great emphasis on reaching out to potential complainants through educational campaigns using all manner of public relations and marketing programs. Considerable attention is also paid to ensuring complainants are able to make use of Ombuds' services easily. For example, information is posted in many languages; staff or interpreters are able to communicate

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<sup>290</sup> *Ombudsman*, *supra*, note 209 at IV B.

in a variety of languages<sup>291</sup>; complaints may be submitted via email or telephone; meetings are arranged to accommodate those for whom traditional office hours or locations are a barrier, etc. As a result of a high level of accessibility, individuals who believe they have been treated unfairly have the opportunity to acquire expert dispute resolution assistance at no cost to themselves, other than the time they invest in submitting and discussing their concern or complaint. Clearly there is very little benefit to having strong powers of investigation and highly skilled, committed dispute resolvers on hand if no one knows about the Ombuds' role and how it functions and how the service may be beneficial.

Following in the same tradition, the emphasis placed on providing education about the work of an Ombudsman can be seen in a recent annual report where the Nova Scotia Ombudsman reported that his office had increased by 51% the number of individuals it had connected with through its outreach work. It was noted that reaching youth in residential and custodial facilities as well as seniors in residential care facilities had been a particular focus and that future efforts would include adult offenders as well.<sup>292</sup> Through this kind of effort more vulnerable detainees may then reach out to the Ombudsman themselves for assistance. This Office's various communication strategies are specifically targeted to meet the Ombudsman's educational goal of increasing citizens' accessibility in order to make use of the Office and for clarifying its role and mandate.<sup>293</sup> This approach is well established in all manner of Ombuds offices where

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<sup>291</sup> In a 2011 newsletter the Ombudsman for Banking Services and Investments (OBSI) indicated that inquiries were being handled in 170 different languages. See "OBSI serving Canadians from Coast to Coast" (24 November 2011), online Ombudsman for Banking Services and Investments <<http://www.obsi.ca>>.

<sup>292</sup> Dwight Bishop, "Nova Scotia Office of the Ombudsman Annual Accountability Report for the Fiscal Year 2009-2010" (July 13, 2010) at 17, 18.

Online: Nova Scotia Ombudsman <<http://www.gov.ns.ca>>.

<sup>293</sup> Bishop, *supra* note 292 at 17.

outreach strategies are constantly being reviewed and improved in order to ensure the availability of the Ombuds role is communicated widely and that the service itself is easily accessible.

### EDUCATION FOR POTENTIAL RESPONDENTS AND PROBLEM SOLVERS Legislative Model

While education of potential respondents so as to encourage fair process without any Ombuds' involvement is not specifically identified in Chief Justice Dickson's foundational description, a preventative orientation is now well developed within the ambit of a wide variety of Ombuds roles. For instance, well before a complaint is brought to the attention of a service provider or administrative decision-maker, Ombuds from all models often offer orientation sessions to personnel in the agencies, organizations or corporations who may be responding to their queries in the future, on their role and function and operating procedures. For example, the Ombudsman for Saskatchewan has pursued the educational vector in an in-depth manner by developing a program known as the 'Fine Art of Fairness' complete with a comprehensive workbook entitled *A Guide for Fair Practice*.<sup>294</sup> This training program is delivered around the province to government staff on a regular basis to assist them to make fair decisions in what is recognized are often difficult circumstances. In a similar vein, the Ombudsman for Manitoba has issued a training manual entitled "Understanding Fairness: A Handbook on Fairness for Manitoba Municipal Leaders".<sup>295</sup> In the same trajectory but taking a different focus, the Ombudsman for Saskatchewan also published a detailed resource entitled *Practice Essentials for Administrative Tribunals*<sup>296</sup> in 2009. These kinds of initiatives demonstrate a preventative

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<sup>294</sup> "A Guide of Fair Practice", online: Ombudsman Saskatchewan <<http://www.ombudsman.sk.ca>>.

<sup>295</sup> "Understanding FAIRNESS A Handbook on Fairness for Manitoba Municipal Leaders", online: Manitoba Ombudsman <<http://www.ombudsman.mb.ca>>.

<sup>296</sup> "Practice Essentials for Administrative Tribunals", online: Ombudsman Saskatchewan <<http://www.ombudsman.sk.ca>>.

orientation and a commitment to capacity building within the actual organizations that are designing and delivering services so as to forestall the emergence of complaints.

#### Hybrid Model

A comparable approach has been used by the Ombudsperson for Students at the University of British Columbia (UBC), Shirley Nakata, whereby a "Fairness Toolkit" has been created including a "Fairness Checklist for Decision-makers". This list poses questions related to twelve different aspects of 'procedural fairness' so that individual administrative units can determine for themselves as they are developing processes and/or making decisions what criteria they should be taking into account in order to be as fair as possible.<sup>297</sup>

#### Organizational Model

As Ombuds operating in the organizational model typically do not issue public reports, I will rely on my own experience working in this model of practice and the anecdotal reports of Ombuds at various workshops and conferences to inform this aspect of Ombuds practice. In my experience, the most frequently referenced type of training arranged and lead by organizational Ombuds is that which is related to effective conflict resolution and civility. Typically, community members are invited to participate in Ombuds-led training that has been set up at the request of particular constituent groups or by senior management or on the Ombuds own initiative.

These kinds of educational approaches are an important adjunct to Ombuds' dispute resolution activities as they have the potential to reduce complaints substantially and contribute to an ethos of fairness within decision-making processes generally.

Nathalie Des Rosiers also refers to this kind of Ombuds work as prophylactic in nature by

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<sup>297</sup> "Fairness Toolkit: Fairness Checklist for Decision-makers" (June 2010) online: Office of the Ombudsperson for Students <<http://ombudsoffice.ubc.ca>>.

specifically identifying ombuds educational efforts as 'preventative mechanisms' in addition to providing a forum for the resolution of disputes in an alternative fashion.<sup>298</sup>

These types of preventative activities undertaken by many Ombuds are primarily designed to build the precepts of administrative fairness and respectful interpersonal communication into all governmental, private, public and not-for-profit administrative activity. The interaction this kind of activity provides also allows for the Ombuds to expand upon and reinforce the independence and impartiality associated with its complaint handling activities.

#### FAIRNESS STANDARDS

In addition to promoting ways and means for public, private and not-for-profit sector employees to engage in fair decision-making so as to prevent complaints from arising, both legislative and hybrid Ombuds often publicize the administrative fairness criteria they expect of others and that they apply themselves when conducting investigations and determining outcomes.

#### Legislative Model

Within the legislative model of practice the Ombudsperson for British Columbia has posted a Fairness Checklist<sup>299</sup> for a somewhat different purpose than the aforementioned UBC Ombudsperson approach, that being, to clarify both for complainants and respondents what criteria will be used when complaints are assessed. For instance, in the jurisdiction of British Columbia the following areas will be taken into account: communication, facilities and services, decision procedures, appeal, review and complaint procedures, organizational issues and agency review and planning.

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<sup>298</sup> des Rosiers, *supra* note 3 at para 20.

<sup>299</sup> "Fairness Checklist", online: Ombudsperson British Columbia <<http://www.ombudsman.bc.ca>>.

### Hybrid Model

The Ombudsperson for the University of Western Ontario has posted an Administrative Fairness Checklist that is designed to assist decision-makers to become aware of the fairness criteria the Ombudsperson expects they will use before, during and after decisions are being made and communicated.<sup>300</sup> In addition, a checklist is also provided to demonstrate what is expected for 'fair service', e.g. non-discriminatory, efficient, good follow-up and fair interpersonal communication, e.g. respectful, honest, etc.<sup>301</sup>

### Organizational Model

The International Ombudsman Association makes a general pronouncement on 'fairness' in its 'Best Practices' commentary as it relates to the organizational Ombudsman's Standards of Practice by stating:

2.2 The Ombudsman strives for impartiality, fairness and objectivity in the treatment of people and the consideration of issues. The Ombudsman advocates for fair and equitably administered processes and does not advocate on behalf of any individual within the organization.<sup>302</sup>

Unfortunately, for the purposes of this discussion, no specific techniques or checklists are provided. However, it is instructive that in 2012 an entire volume of the Journal founded by the International Ombudsman Association was focused primarily on fairness providing a plethora of articles on this topic.<sup>303</sup>

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<sup>300</sup> "Administrative Fairness Checklist for Decision-Makers" July 2006 online: University of Western Ontario <<http://www.uwo.ca/ombuds>>.

<sup>301</sup> "Fair Service Checklist for Institutions/Organizations" July 2006 online: University of Western Ontario <<http://www.uwo.ca/ombuds>>.

<sup>302</sup> "IOA Best Practices, A Supplement to IOA's Standards of Practice" Version 3, October 13, 2009 online: International Ombudsman Association <<http://www.ombudsassociation.org>>.

<sup>303</sup> Journal of the International Ombudsman Association, Volume 4, Number 1, 2011. The articles included are: "Is Life Fair?"; "The Ombudsman's Ability to Influence Perceptions of Organizational Fairness: Toward a Multi-Stakeholder Framework"; Justice as Basis of Equity and Fairness in Ombudsman Practice"; "The Ombudsman's Guide to Fairness"; "I Was Just Thinking About Neutrality"; "I Was Just Thinking About Fairness"; and "Fairness and Self-Evaluation".

As a result of the recognition of the Ombuds' expertise in fair practice and comfort with the use of a wide variety problem solving modalities, it is not uncommon for Ombuds, from all categories of practice, to be asked to deliver training on fairness principles. In addition, some hybrid and organizational Ombuds are also known for offering training on effective communication, civility and team building as well as fair decision-making and the application and delivery of various forms of effective dispute resolution. Another means for advancing the ethos of fairness specific to an organization or more broadly to a large jurisdiction, can be seen in Ombuds from all models of practice commenting on draft policies, and for legislative Ombuds on draft bills, as well as on the design of appeal processes and conflict resolution systems as experts on fair process. Often the feedback provided relates to ensuring that administrative fairness principles have been adequately and properly embedded in notice provisions; decision-making criteria are clearly articulated; and that opportunities for inclusion of ADR modalities are considered as is appropriate to the situation. This kind of consultation is done on the basis of providing input rather than indicating the policy has been accepted by the Ombuds as 'perfect'. Clearly, if the Ombuds was to qualify a policy in such a fashion it would mean the Ombuds would have no credibility when addressing complaints about it at a later date and would not be seen to be either independent or impartial.

#### THE POWER OF RECOMMENDATION

Once again, while Chief Justice Dickson does not specifically reference this quality, it is worthy of note that one characteristic that is common to all Ombuds roles of general jurisdiction or as Ombuds for specific communities, wherever they are located in Canada, is the manner in which they interact with the establishing body to effect change on a specific matter or issue. This pervasive characteristic is that Ombuds make



recommendations that are not binding or enforceable rather than issuing directives, rules, sanction or vetoes. In my view, one of the primary rationales for Ombuds providing recommendations rather than issuing orders or binding decisions is that in all instances an Ombuds' independence should not be compromised by being seen as or to function as a decision-maker for the organization or the government body whose administrative actions are being overseen. If the recommendations made were binding or enforceable the Ombuds is then, by default, determining how the organization or jurisdiction's human resources will be deployed and/or how its financial resources will be spent. In addition, it is recognized within many spheres of dispute resolution<sup>304</sup> that there is great benefit to an individual or organization contributing to the construction of a beneficial outcome and deciding to voluntarily implement a recommendation made as they see its value rather than being forced to do so.<sup>305</sup> As a result, a higher degree of commitment to its effective implementation may occur.

In an attempt to better understand this phenomenon, Marc Hertogh examined the degree to which Ombuds recommendations and administrative court decisions were implemented in the Netherlands, by contrasting the policy impact that resulted from a cooperative approach versus a coercive approach, respectively. Hertogh found that the Ombudsman who adopted a consultative approach, including frequent opportunities for dialogue, which allowed for adjustments as was appropriate, demonstrated a solid understanding of what was practical and achievable in the recommendations made<sup>306</sup> and his interventions were well received and the implementation rate was high. Whereas, by

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<sup>304</sup> Examples of various processes specifically designed to solicit parties' input on an appropriate resolution include mediation, facilitation, restorative justice procedures and talking circles.

<sup>305</sup> Examples of areas of endeavour which have moved from a focus on an adjudicated outcome to incorporating the use of various forms of ADR so as to increase parties' commitment to implementing a joint solution include child welfare, child custody arrangements, divorce and separation and human rights discrimination and harassment claims.

<sup>306</sup> Marc Hertogh, "Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands" (2001) *Law and Policy* Vol.23, No.1. at 61.

comparison, the decisions of the administrative court under review in his study, in some instances, could not be implemented at all. It was observed that this problem occurred as it was logistically impossible to implement some judicial decisions given the judges' lack of understanding of the current administrative environment and the complete lack of opportunity for this kind of information to be made available to the court before the decision was made.<sup>307</sup> In addition, Hertogh's interviewees' comments demonstrated that if an administration didn't like the court ruling they could find a technical means for getting around it; or interpret the ruling in such a fashion so that it was deemed irrelevant or encourage the passage of legislation to override the court's ruling.<sup>308</sup> In addition, in the Netherlands, the administrative court's decision applies only to the instant case<sup>309</sup> so it lacks the systemic or system-wide impact that can result from the Ombudsman's ability to make a recommendation of that nature. As a result, it is ironic that the lack of enforcement that some see as a weakness of the Ombuds model was found not to be an inhibitor, and in fact, supported positive policy improvement. By comparison, it is readily apparent from Hertogh's research findings in the Netherlands context, judicial coercive force did not always have the desired result whereas the Ombudsman's cooperative approach often resulted in system-wide benefit.<sup>310</sup>

It is important to acknowledge that once recommendations are made and accepted, Ombuds typically follow up on how and when those recommendations have been implemented. If a recommendation was accepted and then never implemented it is likely that the Ombuds will bring this lack of accountability to the attention of the head of the organization or in some instances, via public reporting. Ombuds have often been

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<sup>307</sup> *Ibid.* 62.

<sup>308</sup> *Ibid.* 63.

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

quoted as saying that the Ombuds' authority is only the power of moral suasion<sup>311</sup> or the power of persuasion.<sup>312</sup> However, I believe this type of comment is somewhat disingenuous as virtually all Ombuds who have the capacity to report publicly on the issues investigated by their Offices have the ability to put considerable pressure on the government or institution or organization to adopt their recommendations. Similarly, if the respondent is not willing to accept the recommendations, the Ombuds may also publicize the respondent's unwillingness to acknowledge the import of the problem stated or take any steps to deal with a documented fault or failure to execute its mandate properly. While restricted to the ability to recommend only, it is readily apparent that the ability to publicize findings and reports greatly enhances the strength of the recommendation and in my view goes beyond the notion of 'moral suasion' alone.

Recognition of how important 'non-dispositive' decisions can be even though they result in a recommendation rather than a binding decision, was evident in the debate that ensued over the level of fairness required for disclosure of documents pertinent to an appeal made by Mr. Abel, a psychiatric patient who was incarcerated, to the then named Advisory Review Board (the Board) to be released from custody. In *Abel and Advisory Review Board*<sup>313</sup> (Abel) it was decided both by the Divisional Court and the Court of Appeal that even though the Board's recommendation was non-binding the impact was such that the rules of natural justice had to be applied to the appellant's right to know the entirety of the case against him. In this case, the appeal was generated by the fact that the files and reports prepared by the staff in the institution where he was held would only be

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<sup>311</sup> André Marin "Ontario's Ombudsman uses moral suasion to push accountability and the public interest" *Ontario College of Teachers Magazine Professionally Speaking* (1 September 2011) online: <http://www.ombudsman.on.ca>.

<sup>312</sup> Jamieson, *supra* note 165; Owen, *supra* note 50.

<sup>313</sup> *Abel and Advisory Review Board* (1979), 97 DLR (3D) 304 (Ont. Div. Ct.); *aff'd.* (1981), 119 DLR (3D) 101 (Ont. CA).

seen by the members of the Board and not by the appellant himself. While *Abel* is focused on the level of fairness required in the conduct of a particular hearing, the judicial decision-makers' finding recognizes that non-binding decisions can have significant import hence the resultant requirement for a high level of procedural fairness. In addition, from reviewing the special and annual reports of Ombuds from across Canada it is readily apparent that non-binding recommendations made by Ombuds can and have had huge impact on many individuals' lives and the organizations and governments that provide services to them. Analogous to *Abel*, the potential for a positive or negative impact for either the complainant or the respondent as a result of an Ombuds investigation or early resolution intervention or a decision not to pursue a matter, underlies the importance of the Ombuds demonstrating the highest degree of impartiality, independence and fairness in their decision-making processes.

Given the foregoing analysis, it is now readily apparent that the Ombuds role is multi-faceted, unique and complex and the approach the Ombuds will take in any given situation is context specific. While common threads are easily identifiable, the notion of *caveat emptor* ('user beware') should be clearly evident in that users of Ombuds' services, respondents and their various publics must be educated on the specific terms of engagement specified by the enabling Ombuds legislation, terms of reference, Memorandum of Agreement, Charter or policy in order to ensure expectations are accurate and desired outcomes are feasible.

## The Future of Ombudsing in Canada

The historical review of the genesis of the Ombuds role in Canada begins with a student association establishing an Ombudsman<sup>314</sup> at Simon Fraser University in 1965. This effort was followed by the proclamation of legislation so as to establish Ombuds of general jurisdiction in nine provinces and one territory. Between and after these occasions, private sector organizations were establishing hybrid Ombuds roles and public sector entities and government departments were creating organizational Ombuds roles. As a result, it can be very difficult for uninitiated complainants and respondents to know exactly what to expect when they encounter an Ombuds. This reality presents the Canadian Ombuds world and potential complainants or respondents or counsel who interacts with these Ombuds with a conundrum, as it is difficult to know what powers are held by a particular Ombuds even though the title itself appears to be unique. Rowat provides his rationale for his disagreement with what he would consider the indiscriminate use of the term of 'ombudsman' by stating: "The fact that there are so many other types of ombudsmen with less demanding requirements obscures the importance of having absolutely independent ombudsmen in both the private and public sectors for the well-being of democracy".<sup>315</sup> In particular, Rowat laments the 'Americanization' of the Ombuds model in Canada and states the distortion of the concept is too far gone and too firmly established, most notably in the U.S., for any remedial action to allow for the use of the term 'Ombudsman' to be limited to the classical role. He also believes the classical or legislative Ombudsman should be "...restored to its former luster".<sup>316</sup> However, he does

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<sup>314</sup> The history suggests that this Ombudsman operated as either an organizational or hybrid Ombuds depending on the decade. Currently, the SFU Ombudsperson operates in the hybrid model of practice.

<sup>315</sup> Donald C. Rowat, "The American Distortion of the ombudsman concept and its influence on Canada" (2007) 50 Canadian Public Administration 42 at 46.

<sup>316</sup> *Ibid.* at 47.

not provide any rationale for why this burnishing of the legislative Ombuds role is necessary and how it would occur. In fact, I would argue that even the small number of examples of Ombuds activity provided previously demonstrate that the Ombuds luster is bright in Canada today. In contrast, noted British Ombuds scholar, Mary Seneviratne opined that Ombuds worldwide have been very successful. She emphasizes not only the growth in these offices but also the adaptability and flexibility observed in the establishment of this role in a wide variety of contexts.<sup>317</sup>

Rowat also encouraged all Ombuds, wherever they are situated, which, for obvious reasons is much easier said than done, to advocate for greater protection of their independence by establishment of the office by legislation. This scholar's piece of advice is incongruous as it makes one wonder what legislative entity would be in a position to tell the Bank of Montreal or the University of British Columbia or a regional health care association that the Ombuds functions they have created via policy or terms of reference must now be established by legislation? While this approach may be desirable from a theoretical perspective, many practitioners and scholars would submit that 'this ship has sailed' in that it is no longer possible to identify the legislative model as the only correct form for an Ombuds. Additionally, as there is no data to demonstrate that organizational or hybrid Ombuds can not operate effectively, absent a legislative mandate, there may be no compelling reason to do so from a competency perspective. Rowat also proposes that all industries should have independent Ombuds as was established in 1996 by the Canadian Banking Association. However, as pointed out earlier, in November 2008 the Royal Bank of Canada and in November 2011 TD Bank opted out of this scheme and have chosen to retain ADR Chambers (a Toronto based private sector firm that also provides training,

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<sup>317</sup> Seneviratne, *supra* note 33 at 322.

mediation and arbitration services) to serve as final non-binding arbiters of complaints that were not successfully resolved through their own Ombuds process. This unwillingness to accept the not-for-profit OBSI as *the* banking Ombuds for Canada suggests that an 'industry Ombudsman' may not be a universal remedy either. Once again, as Canada's best known Ombuds scholar, Rowat also advocates for all professions to have an independent ombudsman so that the public would respect the handling of complaints against members of a particular profession. He observes "These reforms may seem far-reaching, but they are necessary if Canada is once again to become a leader in ombudsmanship".<sup>318</sup>

Notwithstanding Rowat's considerable reputation, it is also important to recognize that in Canada, in opposition to Rowat's point of view, the evidence provided demonstrates that hybrid and organizational Ombuds roles are neither organizational lapdogs nor are they hamstrung by their terms of reference or founding policy. Their annual and special reports and the systemic changes that have resulted from individual case work and trends analysis that were presented earlier are in fact a testament to the contrary. Typically Ombuds in these roles are not restricted to being only an 'active listener' or 'conflict coach' or 'agent of information and referral' and/or 'impassive mediator'. It must also be reiterated that hybrid Ombuds conduct investigations, both in response to complaints and on their own initiative, and publicize their findings and recommendations in public annual and special reports that have considerable individual and system-wide impact. In many cases, organizational Ombuds are also seen as change agents who identify systemic issues and make recommendations that are implemented in their entirety.

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<sup>318</sup> Rowat, *supra* note 315 at 47.

This journey through a number of perspectives on the establishment and the execution of the roles of Ombuds in Canada demonstrates the similarities, the differences and the resulting complexity and the diversity of contemporary legislative, hybrid and organizational Ombuds' roles. Based on this review the following criteria have emerged as fundamental to the Ombuds role, in whatever category of practice they are established:

- an *inquisitorial* rather than an adversarial framework for assisting with the resolution of disputes and for determining what is fair for legislative and hybrid roles and/or contributing to fairness for organizational roles;
- analyzing individual concerns and complaints for indicators of *systemic and/or system-wide implications* and making use of own-motion or own-initiative authority to analyze trends and address emerging systemic issues;
- *administrative control* of the Ombuds operation along with the ability to investigate (hybrid and legislative) and/or make inquiries (organizational) in the manner that the Ombuds alone determines to be appropriate given the subject matter and the circumstances;
- the power of *recommendation* only;
- an operational style that demonstrates the Ombuds is situated on the *informal* side of the standard dispute resolution spectrum and which does not interfere with the work of the body or unit for which the Ombuds has oversight;
- a high degree of *accessibility* (services widely advertised, easy to use and no fees charged);
- the authority and responsibility to hold all information received and collected *in confidence*;



- Ombuds' adherence to the *principles of natural justice* and administrative fairness in conducting their own work and examining or assessing the work of others;
- Use of *preventative activities*, (e.g. input on draft policies or legislation and leading training initiatives) as is appropriate to the situation;
- Requirement for *impartiality*; and
- *Structural independence* (provided through arms length arrangements coupled with administrative and financial independence and capacity to determine own operational policies and procedures).

When these characteristics are evident in the design of the Ombuds role and are implemented properly, the Ombuds role is as cited by former Chief Justice Brian Dickson "an effective alternative to the courts, the legislature, and the executive branch for righting administrative wrongs."<sup>319</sup> In addition, the historical analysis demonstrates how the role has evolved from reacting to complaints received into systemic analyst and change agent and educator so as to prevent 'administrative wrongs' from occurring in the first place.

Given the import of independence and impartiality to the traditional perception of fairness and the current configuration of Ombuds roles, the controversy surrounding their viability will be investigated in detail in the following chapter.

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<sup>319</sup> *Ombudsman*, *supra* note 209.

### **Chapter 3: Theoretical Constructs for Impartiality and Independence**

#### **Historical Review**

The traditional icon of impartiality, Justitia or Lady Justice is replicated throughout the western world<sup>320</sup> in the same imposing posture in marble and stone replete with blindfold, scales and a sword.<sup>321</sup> Curtis and Resnik in their homage to Robert Cover, the celebrated Yale law professor and activist, who attempted to explain the meaning of law, the role of judges and how justice functions through myth-making and folktales, have explored Mr. Cover's awareness of the ambiguity of the blindfold. On first blush, it appears the blindfold was configured to demonstrate that as Justitia can not see the disputants, by definition, she can not favour one over another.<sup>322</sup> Interestingly enough, this view does not take into account the potential influence of a disputant's style of speaking with respect to social status or level of education or ethnicity which could also result in favour or disfavour. Cover also proffers the potential alternative belief that the use of the blindfold also demonstrated that while having no favouritism, Lady Justice also has no means of gaining insight. In addition, he suggested that Justitia's use of a blindfold could be emblematic of her self-restraint in that she has deliberately chosen to be constrained in a particular way.<sup>323</sup> Curtis and Resnik reconcile these differing forces represented in the blindfolded eyes in their adoption of Fiera's view that "...justice as depicted, simultaneously be attuned to individual nuances and be evenhanded; that objectivity and subjectivity both be present; that justice know all that is needed but not know that which might corrupt or

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<sup>320</sup> Dennis E. Curtis & Judith Resnik, "Images of Justice" (1987) 96, 8 The Yale Law Journal 1727 at 1742 and 1747.

<sup>321</sup> According to Matthew Robinson, the icon of impartiality, a tall and majestic woman holding a set of scales, wearing a sword and a blindfold, who is known as Justitia, the Roman goddess of justice, may have been inspired by the Greek goddess of divine justice, Themis. See Matthew B. Robinson, "Justice Blind? Ideals and Realities of American Criminal Justice". (2002) online: <<http://www.justiceblind.com/issue.html>> 1. Dennis Curtis and Judith Resnik also contend that Justitia had antecedents and was likely preceded not only by Themis and Dike but also by the goddess known as Ma'at from Egyptian culture. See Dennis E. Curtis & Judith Resnik, "Images of Justice" (1987) 96, 8 The Yale Law Journal 1727 at 1729.

<sup>322</sup> Curtis & Resnik, *supra* note 320 at 1728.

<sup>323</sup> *Ibid.*

unfairly influence; that justice be rigorous in its equality yet “now and then” relax in compassion”.<sup>324</sup> It is also worth noting that others, including Judge Otto Kissel<sup>325</sup>, interpreted the blindfold differently and saw it as depicting either willful or unintentional failure to see the truth.

Early expressions of ‘impartiality’ can also be found in textual form in the Latin term of *‘nemo iudex in parte sua’* which was an important principle in the Roman judicial system. The literal translation, ‘no man shall be a judge [or is fit to be a judge] in his own cause’, is currently understood to be the prohibition against bias on the part of a decision-maker and is a key aspect of the articulation of the principles of natural justice. This terminology is evocative in its simplicity in that virtually anyone regardless of age, amount of education and experience, can both rationally and intuitively understand that a decision-maker should not be driven by self-interest if his or her decision is to be accepted as fair by those who are affected by it, and by those who are observing both the process and the outcome.

In comparison, the other well known Latin phrase, *audi alteram partem*, which is the first criterion for natural justice, declares that disputants must be able to hear the case against them and present their views to the decision-makers before a final conclusion is reached. This phraseology includes the requirements for appellants or claimants having adequate notice of the timing and nature of the proceedings; knowledge of the ‘case’ against them and the opportunity to both know and question the evidence provided in support of the case.<sup>326</sup> While this expectation could be interpreted to relate solely to the mechanical aspects of how proceedings are conducted, there is also a qualitative aspect

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<sup>324</sup> *Ibid.* at 1764.

<sup>325</sup> *Ibid.* at 1757.

<sup>326</sup> This principle is explained well by Lorne Sossin in “An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law” (2007) 27 *Queen’s Law Journal* 819 at 824.

inherent in these exhortations; that is, the proceedings must be organized and conducted in such a fashion so as to provide the best opportunity for the parties to a dispute to present their cases in full, whether it be to a sole decision-maker or a tribunal of multiple decision-makers. In the same vein, Cover observed that in the Code of Maimodes, a twelfth century Jewish law, a 'righteous judgment' is defined as one that is perfectly impartial in relation to the litigants in that neither receives more or less courtesy or respect than the other.<sup>327</sup>

Stanley Benn quotes Aristotle whose perspective was articulated at some point between 364 and 322 B.C. in Greece and defined impartiality as a 'kind of equality'.<sup>328</sup> Aristotle's view was "...justice consists in treating equals equally and unequals unequally, but in proportion to their relevant differences".<sup>329</sup> It appears that the Aristotelian view is the equivalent of the modern day definition of 'equity' whereby cases should be treated the same if the parties are similarly situated, and if the decision-maker has determined there were relevant differences they should be treated differently in accordance with their distinctive circumstances.<sup>330</sup> Duhaime states "*Equity* is based on a judicial assessment of fairness as opposed to the strict and rigid rule of common law".<sup>331</sup>

Fast forward to the 1500s and 1600s and according to Curtis and Resnik, Judge Kissel observed that the use of the blindfold imagery in paintings, sculptures and woodcuts of Lady Justice is directly related to the evolution of the judicial role from that of a lay person to a 'trained professional' along with the establishment of a judiciary independent

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<sup>327</sup> Curtis & Resnik, *supra* note 320 at 1758.

<sup>328</sup> Louis P. Pojman, *Justice*, (New Jersey: Pearson Education Inc., 2006) at 1.

<sup>329</sup> *Ibid.* at 1.

<sup>330</sup> Lorne Sossin adds depth to this concept in the following comment: "Treating all parties the same when in fact all parties are unique is itself a kind of bias." Sossin, *supra* note 326 at 821.

<sup>331</sup> *Duhaime Legal Dictionary*, s.v. "equity". Online: <<http://www.duhaime.org>>.

from royalty or governing bodies.<sup>332</sup> This theory is predicated on the existence of the blindfold which considered in this context would prevent the Justice from seeing any directive signals sent by an authority figure attempting to interfere with his independence.

Madam Justice Huddart describes the Middle Ages in Britain similarly as being a time when judges were no longer beholden only to the King, as their employer, who had the power both to appoint and dismiss them, at his pleasure, as well as to determine their remuneration. At this juncture judges became loyal to the concept of the Crown, as a symbol of the people as a whole, rather than being devoted to a monarch. Justice Huddart noted that it was not until the Stuarts were overthrown in the 17<sup>th</sup> century that the codification in 1689 of the separation of the judiciary from the monarch in the British *Bill of Rights* resulted in the true independence of the judiciary. Furthermore, it was in *The Act of Settlement*, written in 1700, that the British Parliament guaranteed security of salary and tenure for its judges. In 1760, the more extreme form of 'tenure for life' predicated on good behaviour, was enacted by the Hanovers. The Right Honourable Chief Justice Beverly McLachlin also noted in her comments to the Conference on Law and Parliament in 2006, that prior to getting to the point of the enactment of the aforementioned Act of Settlement, Henry II who set up the first permanent court, retained the ability to 'hire and fire at will' and both Charles II and James II routinely released judges with whom they disagreed.

Chief Justice McLachlin notes that the high degree of judicial independence that is now so well established in Canada is also the "...foundation of impartiality".<sup>333</sup> Justice Huddart takes this theoretical construct further in that she identifies the concept of

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<sup>332</sup> Curtis & Resnik, *supra* note 320 at 1757.

<sup>333</sup> Beverly McLachlin, Remarks Presented at the Law and Parliament Conference, Ottawa, (2 November 2, 2006) online at <<http://www.scc-csc.gc.ca>>.

independence as a 'guarantor'<sup>334</sup> of impartiality in paraphrasing the SCC statement that independence guarantees impartiality in 2747-3174 *Quebec Inc. v. Quebec (Régie des permis d'alcool) (Régie)*.<sup>335</sup> Interestingly, in a separate area of endeavour, that of the regulation of broadcasting in Britain, Sylvia Harvey pointed out that the Chairman of the Governors of the British Broadcasting Corporation (BBC) promoted the use of the reverse of that equation in that she concluded that impartiality was in fact the precursor to independence. Specifically, the Chairman indicated that it is only if the BBC is perceived to be impartial by its audience that it will be given the degree of support, presumably financial and a properly constructed regulatory framework that assures its independence.<sup>336</sup> This belief is also contained in the Standards of Practice established by The International Ombudsman Association stated as: "The Ombudsman endeavors to be worthy of the trust placed in the Ombudsman Office"<sup>337</sup> and as a result of her behaviour is perceived to be impartial.

A historical voice central to the concept of judicial impartiality in western, liberal society is that of John Locke. His *Two Treatises of Government*, published in 1690 in Britain is also coincident with the creation of an independent judiciary. Locke's view, that a proper adjudicator, "...a known and indifferent judge..."<sup>338</sup> is essential to the supremacy of the rule of law and fair adjudication, has reverberated throughout history to current times. His rationale for the requirement for 'indifference' is predicated on his assertion that men who are in a state of nature will naturally be 'partial' to their own needs, and may also

<sup>334</sup> Madam Justice Carol Mahood Huddart, "Know Thyself: Some Thoughts About Impartiality of Individual Decision-makers From an Interested Observer" (1999-2000) 13 Canadian Journal of Administrative Law and Practice at 147.

<sup>335</sup> 2747-3174 *Quebec Inc. v. Quebec (Régie des permis d'alcool) (Régie)* 1996 D.L.R. (4<sup>th</sup>) SCC 577 at 106.

<sup>336</sup> Sylvia Harvey, "Doing it my way – broadcasting regulation in capitalist cultures: the case of fairness and impartiality", 20 Media, Culture & Society. 549.

<sup>337</sup> "IOA Standards of Practice" (January 2007) online: International Ombudsman Association

<<http://www.ombudsassociation.org>>.

<sup>338</sup> Locke, *supra* note 17 at 296.

demonstrate great passion and vengeful feelings.<sup>339</sup> He also observed that the possibility of men being negligent and unconcerned about others also exists. As a result, men who are not 'known and indifferent', could not realistically be given the authority to weigh in on disputes and apply the law as required. Another rationale for the legitimacy of 'indifference', from a judicial standpoint, in the Lockean context, is that Locke's treatise envisioned all men as being free and equal members<sup>340</sup> of society who were able to pursue whatever goals they chose to be important in terms of creating their legislative governments, supporting and opposing legislation, and acquiring and maintaining property.<sup>341</sup> Clearly his concept of freedom and equality for all was an idealized version of society rather than representative of reality. A few centuries later, John Rawls also expounded on the concept of impartiality in his treatise modestly entitled *A Theory of Justice*. One of the key elements of the theory he proposed for establishing a system of justice for a democratic nation is the notion of the 'original position'.<sup>342</sup> The 'original position' is predicated on the concept of a fair procedure being used to determine rights and responsibilities so that, by definition, whatever is decided upon through the participants' deliberative process will be just. As a result, this foundational concept, (which he emphasizes is purely a hypothetical construct), is that the precepts upon which a system for justice is built would resonate as being acceptable to everyone who had liberty of thought and person, was a rational thinker and was equal to everyone else in this utopian universe.

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<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.* at 75.

<sup>341</sup> *Ibid.* at 294.

<sup>342</sup> John Rawls, J. *A Theory of Justice*. (Cambridge: Harvard University Press, 1971) at 130.

A key element of the deliberation involved in choosing the principles of justice is that none of the participants would know the nature of 'his'<sup>343</sup> actual physiology, (e.g. knowledge of a physical disability and/or a high degree of athleticism); intelligence, (e.g. no understanding of whether associates' perception of the participant was 'Einsteinian' or otherwise); social status, (e.g. would not know whether a well connected, financially independent philanthropist or a small business owner struggling to keep up with the minimum payments on a 'line of credit') and no knowledge of personal values, (e.g. no awareness of being in the military or a conscientious objector or of being pro-life or pro-choice).

The metaphor coined by Rawls to depict this lack of personal knowledge and self interest is 'the veil of ignorance'.<sup>344</sup> His hypothesis is that only individuals, wearing this figurative veil, would be in a position to determine the rights and responsibilities of *all* the members of a particular jurisdiction. However, Rawls made it clear that the people in the 'original position' would have a great deal of wide-ranging knowledge about "... the general facts about human society....political affairs...economic theory...basis of social organization...and the laws of human psychology".<sup>345</sup> His proposal that a body of universally accepted factual knowledge would inform the participants in the 'original position' is 'easier said than done' as it is not only readily apparent from daily living but also from popular and scholarly literature how difficult it is to separate fact from opinion in each of the aforementioned areas.

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<sup>343</sup> While Rawls (1971) only uses the pronouns of 'he' and 'his' throughout his description of the original position in describing his views I will use more modern language.

<sup>344</sup> Rawls, *supra* note 342 at 136.

<sup>345</sup> *Ibid.* at 137.



Rawls's 'veil of ignorance' is noted by Julie Macfarlane as representing an aspiration to "...ultimate objectivity"<sup>346</sup> and is used to introduce the topic of 'neutrality' as one of the critical issues in the practice of mediation. However, while Rawls devotes an entire chapter to the concept of 'The Veil of Ignorance' he makes no reference to neutrality or impartiality at this juncture of his theory building. While he does introduce the notion of a 'referee'<sup>347</sup> who could be retained to announce what alternatives were under consideration and the rationale for proposing them; who could also ensure that no coalitions were being built; and could summarize the discussion, he then dismisses the value of having a third party referee involved. He states that as everyone *must* be thinking similarly as they are required to assess principles being posited in relation to general considerations rather than to how the principles under discussion would affect them personally; the involvement of a third party would be superfluous.

Ironically, while Macfarlane's view is that the 'veil of ignorance' is a symbol of objectivity or impartiality it does not appear to me that Rawls ever intended his metaphor to be applied to describe how a judge, arbitrator, mediator or an Ombuds should view the evidence collected or information provided to her. In fact as noted earlier, Rawls specifically jettisons the utility of a referee in the theory building process. However, he does begin to make use of the terms of 'impartial and impartiality' later in building his theory for justice when he introduces the concept of a "...rational and impartial sympathetic spectator".<sup>348</sup> This is a person who has a general view; is knowledgeable and intellectually capable and has no self-interest in whatever is to be determined. In Rawls' view, though, this spectator is more than an uninvolved observer than the use of the term

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<sup>346</sup> Macfarlane, *supra* note 29 at 443.

<sup>347</sup> Rawls, *supra* note 342 at 139.

<sup>348</sup> *Ibid.* at 186.

'spectator' would normally imply. Specifically, Rawls' 'spectator' is actually someone who is both responsive and sympathetic to what everyone else in the social system wants and needs. In Rawls' view the misnamed 'spectator' is expected to put himself in the place of each of the societal members and appreciate in an in-depth manner, through what he calls "...giving free rein to his capacity for sympathetic identification..."<sup>349</sup> how the principle that is being debated would affect these individuals' lives. Rawls concludes that his spectator would then, after understanding each person's situation and aspirations, balance the positive and negative ramifications so the final result is the most positive outcome for everyone.

In fact, Rawls (1971) indicates that *after* the principles of justice have been established by individuals in the 'original position, 'the veil' can be removed. Thus, his terminology at this stage of his explanation suggests he is proposing when justice is actually being meted out or applied to a particular circumstance, the type of information allowable is that which is necessary for the intelligent application of the principles of justice that have been accepted. In addition, the use of any knowledge that would result in bias would be restricted. Rawls (1971) succinctly states:

...The notion of the rational and impartial application of principles defines the kind of knowledge that is admissible. At the last stage, clearly, there are no reasons for the veil of ignorance in any form, and all restrictions are lifted.<sup>350</sup>

Perelman's view is similar in that he states it would be misleading to expect a judge to be "...a mere 'spectator' of the human scene".<sup>351</sup> In his *Justice, Law and Argument*, he reminds us disinterest and detachment are not qualifications of a judge who is just, rather, a judge must take a position on the facts as presented.

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<sup>349</sup> *Ibid.*

<sup>350</sup> *Ibid.* at 200.

<sup>351</sup> M. Perelman, *Justice, Law and Argument: Essays on Moral and Legal Reasoning* (Dordrecht, Boston, London, 1989) 67.

Brian Barry, in *Justice as Impartiality* argues that we must recognize there are two types of impartiality. He defines second order impartiality as "... a test to be applied to the moral and legal rules of a society: one which asks about their acceptability among free and equal people".<sup>352</sup> Clearly this is the type of impartiality Rawls is referring to in his theory of justice. However, Barry notes: "The critics [of Rawls] are talking about first-order impartiality – impartiality as a maxim of behaviour in everyday life."<sup>353</sup> Rawls, in fact, defined impartiality as a capacity that "...prevents distortions of bias and self interest".<sup>354</sup> While it would be unreasonable to expect people to be impartial about interactions between their loved ones and strangers if health and safety are at risk, it is the traditional conception of impartiality, whereby no favour or predisposition or positive or negative bias is shown by a third party to those in dispute, that is the subject of this discussion and this study overall.

### Challenges to Impartiality and Independence

The terms of 'neutrality' and 'impartiality' are ubiquitous in descriptions of traditional dispute resolution within the historical and contemporary legal literature and lexicon. These terms are also central to the definitions of various forms of alternative dispute resolution (ADR) like arbitration, mediation, (as practised in western society), conciliation, facilitation and ombudsmanship/ombudstry (ombudsing), as well as some forms of administrative decision-making. Nonetheless, there are many scholars and practitioners who have critiqued the notions of 'neutrality' and 'impartiality' and have said categorically they are not only impossible to achieve but should not even be presented as desirable aspirations. My analysis is to explore these conflicting notions in three parts. Firstly, I

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<sup>352</sup> Brian Barry, *A Treatise on Social Justice Volume II JUSTICE AS IMPARTIALITY* (Oxford: Clarendon Press, 1995) 194.

<sup>353</sup> *Ibid.*

<sup>354</sup> Rawls, *supra* note 342 at 187.

discuss the manner in which these terms have been defined and understood in theory and practice as well as analyzing whether 'neutrality' and 'impartiality' are appropriately used as synonyms or whether they actually have different meanings.

Secondly, I will elucidate the three most common models of judicial decision-making established by political scientists and legal theorists to provide a foundation for my examination of six key examples of empirical research on independence and impartiality in relation to Canadian and American judicial decision-making as well as one Canadian administrative tribunal's decision-making patterns. Following this examination, I will investigate the rationales provided by those who have determined impartiality is both impossible and undesirable, as well as those who aspire to be and those who believe they can be impartial by the use of particular strategies and methodologies. In addition, I will discuss how the construction of traditional and contemporary legal structures as seen through the lens of critical analyses that is on the basis of gender, race and class can detract from the concepts of impartiality and independence. In addition, I will introduce the concepts of 'multi-partiality', 'responsible partiality' 'omni-partiality' and 'structural impartiality' to add yet another dimension to this complex dialectic. Finally, I will also review the research conducted by social psychologists on how information is processed and decisions made in relation to bias and stereotyping to further inform this analysis.

Thirdly, given the interconnectedness of independence and impartiality in some contexts, I will comment on seminal examples of Canadian case law on the relationship between these two principles. Finally, I will offer various theorists' perspectives on ways and means for meeting, and indeed overcoming, the many challenges to impartiality and independence that some would consider to be inherent in our psyches and within many legal structures.

### What is meant by Neutrality or Impartiality?

As early as 1938 Lord Macmillan posited the following view:

For a judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by their possessor. Few minds are as neutral as a sheet of plate glass, and indeed a mind of that quality may actually fail in judicial efficiency, for the warmer tints of imagination are needed to temper the cold light of human reason if human justice is to be done.<sup>355</sup>

In more recent times, feminist and critical theorists in law, philosophy, and social psychology have injected a great deal of energy and expertise into this debate. For example, scholars and practitioners in the area of mediation, who are often one and the same, have been particularly active in stating neutrality [and presumably, impartiality as the terms are often used interchangeably] is impossible to achieve. For example, legal scholar and mediator, Linda Mulcahy has explored whether neutrality is possible and more importantly, from her perspective, desirable, in the context of the use of mediation for resolution of disputes between residents of disintegrating, poorly built, social housing units located in one of the most economically disadvantaged areas in London in the United Kingdom. She observes that within the legal system, neutral judges are supposed to "...rise above personal politics, to resist and transcend their personal, instinctive and intuitive sympathies and submit to something beyond them."<sup>356</sup> In her opinion, this is not a desirable model for mediators to replicate or emulate as, in her view, it is not only impossible for any third party to achieve such a state, it would not be ethical to do so. In particular, she conducted research with the seven staff and 20 volunteers associated with the Southwark Mediation Centre who conducted in excess of 400 mediations annually

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<sup>355</sup> Rt. Hon. Lord MacMillan. *Law and Other Things* (Cambridge: Cambridge University Press, 1938) at 217.

<sup>356</sup> Linda Mulcahy, "The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?" (2003) 10 *Social & Legal Studies* 505 at 507.

within the context of deteriorating and dangerous social housing. Given her belief that the inherent dysfunction and unfairness of the social housing organization itself is the root cause for the disputes between community residents, she emphasizes the respect she has for mediators who take stands on the ethical issues that come to their attention rather than subscribing to an ethic of neutrality based on disinterest.<sup>357</sup> In light of Macmillan's and Mulcahy's rejection of the validity and value of the principle of neutrality both within a judicial and ADR context, I will investigate whether impartiality can stand on its own or should it also be jettisoned from the legal lexicon given the terms are often used interchangeably.

#### Neutrality vs. Impartiality

It is not uncommon for some legal scholars and all manner of third parties, such as adjudicators, arbitrators, mediators, Ombuds and the people who interact with them, to use neutrality and impartiality as synonyms. Accordingly, it is vital to the debate to interrogate how these terms are defined and the ways in which they are used. As this manner of speaking is both confusing and, in my opinion, an inaccurate use of this terminology, I will investigate the definitions behind common legal parlance to demonstrate why it is actually unacceptable to continue this practice.

Surprisingly, given how often reference is made to a 'neutral third party' in the descriptions of various forms of traditional and alternative dispute resolution the *Canadian Law Dictionary* does not include an entry for 'neutral' or 'neutrality'. However, it does provide a definition for 'impartial' as "the state of being fair and neutral, lacking any and all bias and/or prejudice".<sup>358</sup> By comparison, *A Dictionary of Modern Legal Usage* does not have entries for either 'neutral' or 'impartial'. In contrast, in looking at fourteen different

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<sup>357</sup> *Ibid.* at 521.

<sup>358</sup> John Yogis, ed., *Canadian Law Dictionary*, (New York: Baron's Educational Series Inc, 1998) s.v. "impartial".

non-legal dictionary definitions, the term of 'neutrality' was defined as relating to non-interference in a war in a particular situation or a state of continual non-interference or non-intervention; and 'impartiality' was frequently defined as being even-handed, unbiased and unprejudiced. However, in some instances, these two terms were used as synonyms for one another or Edmund Burke's famous 1794 phrase - "the cold neutrality of the impartial judge"<sup>359</sup> - was used to provide context for the definition of both 'neutrality' and 'impartiality'.

The gold standard for legal terminology, *Black's*, makes a greater degree of distinction than previously cited legal dictionaries in that 'impartial' is defined as "unbiased, disinterested"<sup>360</sup> and 'neutral' is defined as " 1) indifferent, and 2) of a judge, mediator, arbitrator, actor (refrain from taking sides in a dispute)".<sup>361</sup> *Black's* first criterion for the definition of 'neutral' reinforces the validity of Mulcahy's view in that it would clearly be both wrong and unethical for a mediator in the milieu investigated by Mulcahy<sup>362</sup> to be neutral and therefore indifferent to the horrors of the parties' lives created by their publicly funded and operated housing environment.

In assessing the terminology used to define 'impartiality' the question arises as to how an individual who is truly 'disinterested' and therefore 'impartial' could fully appreciate the realities and nuances of circumstances very different from her own. It is also ironic, in my view, that *Black's* continues in the same vein as some of the other dictionaries consulted in that 'neutrality' is defined as maintaining peaceful relations with those that are

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<sup>359</sup> *Lexipedia Beta* online: <<http://www.lexipedia.com/english/>> s.v. "impartial".

<sup>360</sup> *Black's Law Dictionary*, 8<sup>th</sup> ed., s.v. "impartial".

<sup>361</sup> *Ibid.* s.v. "neutral".

<sup>362</sup> Mulcahy *supra* note 356.

described as 'belligerents' within the context of a war as opposed to disputes of a more general nature.<sup>363</sup>

In looking at the etymology of these terms, important clues are provided for why 'neutrality' and 'impartiality' are considered synonymous in some settings. Specifically, the term 'neutrality' first appeared in the English language in 1480 as a derivation of the French term of 'neutralité' and was used to identify "the neutral party [person] in a dispute".<sup>364</sup> It then appeared again in 1494 as used by Jean Froissart, differently, to refer to an *attitude* neutral in nature. Next 'impartial' came into being in England in 1593 and was used, not surprisingly, to demonstrate a lack of partiality or bias. It was observed that the new term of 'impartial' was first used by William Shakespeare in his play entitled *Richard II*.<sup>365</sup> Given this initial foundation it is not surprising these terms were and are still often seen to be interchangeable.

However, as noted by Dominick Donald in his analysis of peace-keeping operations, the modern dictionary definitions of these two terms are thoroughly confusing and therefore not defensible.<sup>366</sup> While he observes there is common ground to be found in these terms, their meanings, in reality, are distinct. He notes in order to be impartial one has to have the capacity to make judgments while the notion of neutrality is that of passivity. In particular, to be impartial is often equated with being fair and just. In order to demonstrate fairness and justice, clearly a position has to be taken on the issues in dispute. However, the essence of neutrality is that no position is taken. Donald articulates

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<sup>363</sup> Black's *supra* note 360 s.v. "neutrality".

<sup>364</sup> The Online Etymology Dictionary online: <<http://www.etymonline.com/index.php?term=neutrality>>.

<sup>365</sup> *Ibid.* s.v. "impartial".

<sup>366</sup> Dominick Donald, "Neutral is Not Impartial: The Confusing Legacy of Traditional Peace Operations Thinking" (2003) 29 *Armed Forces and Society* 415 at 415.



the difference between these two terms as: "At its simplest, neutrality is an absence, impartiality is a presence".<sup>367</sup>

Louis Pojman also weighs in on this debate by declaring that rather than 'neutrality' and 'impartiality' being the same or even similar they are in fact opposites. His view is impartiality can not be defined as indifference or equated with neutrality as acting impartially requires "...making judgments according to rules".<sup>368</sup> He uses the analogy of the umpire at a sporting event as someone who is impartial rather than neutral in that determinations are made on how to call the game fairly, as required by the rules, regardless of the umpire's personal likes or antipathies to particular players or any financial benefit that could accrue to him personally by making particular choices.

#### How Does an Umpire Demonstrate Impartiality?

Bruce Weber makes use of the same analogy, in "Umpires v. Judges"<sup>369</sup> in commenting on the then upcoming confirmation hearings for Sonja Sotomayor, the first Latina nominee to the U.S. Supreme Court. He observes that at the current Chief Justice's (John J. Roberts) own confirmation hearing Roberts had stated "Judges are like umpires"<sup>370</sup>. Umpires don't make the rules; they apply them...".<sup>371</sup> Presumably, Chief Justice Roberts made this statement in an effort to demonstrate his personal commitment to judicial restraint. Similarly, by referring to his confidence in the comportment of umpires, this Chief Justice was also telegraphing that he could be trusted not to insert his personal views into his decision-making process. As Weber indicates, the conventional belief is that judges can "...check their personal beliefs and biases (not the same thing) at the door of

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<sup>367</sup> *Ibid.* at 418.

<sup>368</sup> Pojman, *supra* note 328 at 25.

<sup>369</sup> Bruce Weber, Week in Review, "Umpires v. Judges" *The New York Times* (12 July 2009) 1 at 1.

<sup>370</sup> In contrast to Chief Justice Roberts analogy, Sunstein et al take a different view when they say: "Judges are not exactly umpires: they have a great deal of discretion." Sunstein et al note 432 at 83.

<sup>371</sup> *Ibid.*

the courtroom...".<sup>372</sup> Unfortunately, no explanation is provided for how the process of 'checking one's biases or beliefs' is accomplished.

In querying the now Associate Justice Sotomayor's understanding of the role of a judge, Weber notes that Senator Coryn, a member of the U.S. Senate Judiciary committee, also used the umpire metaphor in pondering whether Ms. Sotomayor saw the role of a judge as a means for advancing causes that were personally important to her or to "...call balls and strikes".<sup>373</sup> In my view it is ironic that the individuals who occupy such influential roles in society, that is, the current U.S. Supreme Court Chief Justice and a high ranking Senator who is vetting nominees for this bench, have reduced their understanding of the complex and important role of a judge, and the influence their values have on their decisions, to that of an umpire who has a very limited sphere of responsibility, that is, the size of the strike zone.

Interestingly enough, 'the judge as umpire' theory has segued into the ADR world as 'complaint handler as referee' via the appointment of Bruce Hood, a former National Hockey League (NHL) referee, as the Canadian Travel Complaints Commissioner. Presumably to emphasize the applicability of his former role, Mr. Hood "...pulled out a whistle at a news conference in Ottawa, just like the one he used as an NHL referee for more than 20 years..."<sup>374</sup> when his appointment was announced. The conventional belief that umpires, as described previously, and a referee, as described above, have no vested interest in a particular outcome and always operate dispassionately when they don their uniforms, defies reality as no evidence has been provided to support this supposed truism. The structural aspects of independence may be seen to contribute to this perception.

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<sup>372</sup> *Ibid.* at 5.

<sup>373</sup> *Ibid.*

<sup>374</sup> "Ex-NHL referee will blow whistle on air travel complaints" (1 August 2000) CBC News online: CBC News Canada <<http://www.cbc.ca>>.

However, day-to-day experience demonstrates that the structural guarantees alone are an insufficient underpinning for impartiality.

In keeping with the aforementioned sports analogies another metaphor has been added to the discussion of how impartiality should be defined. Martha Minow noted that Clarence Thomas, as the second African American nominee for the U.S. Supreme Court and now Associate Justice Thomas, when testifying to the Senate Judiciary Committee indicated that a judge should want "...to be stripped down like a runner,...".<sup>375</sup> Her view is such a metaphor is not apt for justice to be done. Rather she opines it would be more appropriate for Justice Thomas to draw upon the experiences that made him feel disenfranchised, as well as to assist his colleagues to examine their own perspectives on bias. Her thesis is that judges and juries should not only be objective in relation to the facts of the case and determining guilt or innocence but they should also be "...committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others".<sup>376</sup> This theory of 'judging' demonstrates the importance of knowing what has influenced you, what you believe to be true and why you believe it so you can challenge those beliefs and be open to new interpretations. Minow also makes the point that 'fair representation', (that is, decision-makers being drawn from a variety of races, genders, social and economic backgrounds), contributes to impartiality by virtue of the availability of a wider variety of perspectives on the so-called 'facts' of the case.<sup>377</sup>

In an attempt to achieve this goal in populating administrative tribunals in the province of Ontario, the Public Appointments Secretariat (the Secretariat) which is

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<sup>375</sup> Martha Minow, "Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors" (1991 – 1992) 33 William & Mary Law Review 1201 at 1201.

<sup>376</sup> *Ibid.* at 1217.

<sup>377</sup> *Ibid.* at 1209.

responsible for advertising and organizing selection processes for the recruitment of appointees for the 630 entities which are known as 'Agencies, Boards and Commissions' has publicly articulated its commitment to the principle of 'fair representation' as one of its governing principles.<sup>378</sup> For example, it is stated in the Secretariat's mission "Persons selected to serve must reflect the true face of Ontario in terms of diversity and regional representation..."<sup>379</sup> as well as making certain appointees have professional and personal integrity and are well qualified.<sup>380</sup> A further commitment to broad representation is found in the Secretariat's stated devotion to ensuring "...all segments of Ontario society..."<sup>381</sup> are included in the ranks of those who serve on agencies, boards and commissions.

It is also important to note that in order to be considered qualified, specialized expertise is also a criterion for many appointments to administrative tribunals. However, the means by which that expertise has been acquired may result in decision-makers being challenged for not being impartial, or, for being biased in favour or or against particular individuals or issues.<sup>382</sup> For example, in *Marques v. Dylex Ltd.*<sup>383</sup> the validity of the certification of a union was challenged because a member of the Ontario Labour Relations Board had worked for a law firm that had previously represented the union involved. However, Justice Morden pointed out in dismissing the challenge that it is both appropriate and necessary that "...the chairmen [sic] of Panels will have had experience and expertise in the law and labour relations. The Government of Ontario looks to people with such a

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<sup>378</sup> "Principles Governing the Appointments Process" (04 September 2009), online: The Government of Ontario Public Appointments Secretariat <<http://www.pas.gov.on.ca>>.

<sup>379</sup> *Ibid.*

<sup>380</sup> *Ibid.*

<sup>381</sup> *Ibid.*

<sup>382</sup> David J. Mullan, *Administrative Law Cases, Texts and Materials*, "Bias and Lack of Independence", 5<sup>th</sup> ed, Toronto: Emond Montgomery Publications Ltd., 2003) at 571.

<sup>383</sup> *Marques et al. v. Dylex Ltd. et al.* [1977], O.J. No. 2469 (QL).

background in making appointments”.<sup>384</sup> As a result, appointees who have acquired the requisite expertise through working in a specialized area of law, or through study and practice in particular areas of endeavour, (e.g. health, science, education, gerontology, etc.) will not automatically be deemed to be biased due to the extent of their subject matter expertise; and instead will be chosen precisely for their in-depth knowledge on particular subjects. Given this view, it would appear that it is the responsibility of the ‘expert appointees’ to recognize and manage their personal and professional biases or partialities, as is appropriate to the situation.

#### Impact of Confusion in the Use of ‘Neutral’ and Neutrality

In Catherine Morris’ view the lack of clarity in the definitions of neutrality and impartiality has resulted in “...a confusing discourse”.<sup>385</sup> In making this observation she strives to illustrate how difficult it is to discuss what are often considered to be essential characteristics of ‘third party neutrals’ in a useful way. In addition, her view is the lack of consistency found in these definitions would make it very difficult to evaluate the quality of ‘third party neutral’ interventions where there is little understanding of, or agreement on what these two defining characteristics mean. In addition, Morris also opines that while she finds it “...abhorrent...”<sup>386</sup> to remove the term ‘impartial’ in regard to the description of a mediator’s role and work, she does so for the sake of clarity and uses instead ‘non-partisan fairness’. She defines this term as “...the general concept of fairness to all parties”.<sup>387</sup> The introduction of this term, in my view, does not add any greater precision to the subject under discussion as ‘fairness’ is defined by the context in which decisions are

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<sup>384</sup> *Ibid.* at para 34.

<sup>385</sup> C. Morris, “The Trusted Mediator: Ethics and Interaction in Mediation” in Julie Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications Ltd. 2003) 443 at 444.

<sup>386</sup> *Ibid.* at 455.

<sup>387</sup> *Ibid.* at 444.

made. As a result, while it is important to address the pervasive inaccurate use of terminology I would argue that Morris' preferred alternative neither provides clarity nor advances the understanding of the concept of impartiality.

The difficulty with lack of precision in the definitions of these terms and the actions taken under their mantle is also rampant in the ADR literature in relation to various types of mediation. This problem is encapsulated by Kovach and Love in their critique of the emergence of certain types of mediation described as 'evaluative mediation', 'liti-mediation', and 'Michigan mediation'.<sup>388</sup> Their concern is that in what is also known as 'muscle mediation', the parties in dispute continue in an adversarial mode and the mediator simply becomes an arbiter of the facts who provides a non-binding opinion or an arm-twister who gets the parties to agree to 'split the difference' or 'get as much as you can while you can'. This style of mediation is anathema to the notion of 'transformative' mediation, whereby parties communicate with each other in such a way as to transform their relationship or their views of each other and develop through synergistic discussion a much better outcome than either could have arrived at on their own or one imposed by an external decision-maker.<sup>389</sup> This migration from the original concept of facilitative mediation, which is simply to help people in dispute come up with their own, mutually satisfactory resolution, to describe activities which are not actually mediations or some subset of mediation is also evident in an expanded use of the term of 'neutrality'. For example, other scholars and practitioners within the field of mediation have coined additional terms like Solstad's 'active neutrality'<sup>390</sup>, Taylor's 'expanded neutrality'<sup>391</sup> and

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<sup>388</sup> K.K. Kovach & L.P. Love, "Mapping Mediation: The Risk of Riskin's Grid" (1998) 3 Harvard Negotiation Law Review 71 at 92.

<sup>389</sup> C. Menkel-Meadow, "The Many Ways of Mediation" (1995) 11 Negotiation Journal 217 at 228.

<sup>390</sup> K.E. Solstad, "The Role of the Neutral in Intra-Organizational Mediation: In Support of Active 'Neutrality' " (1999) 17 (1) Conflict Resolution Quarterly 67 at 69.

Friedman's 'positive neutrality'.<sup>392</sup> Unfortunately, the aforementioned terms are even more perplexing than the indiscriminate use of the original terms of 'neutrality' and 'impartiality' as they conflate opposing notions and make it difficult to both understand and analyze how these qualities contribute to effective dispute resolution. In fact, in some instances, the pairings are actually oxymoronic if the reader accepts the traditional view that 'neutral' means being passive and uninvolved. James D. D. Smith, in advocating for more precision in the definition of what constitutes a mediation, refers to the idea of mediator impartiality as a chimera as so little effort has been made to distinguish between what he refers to as 'pure' mediation and 'power' mediation. His view is impartiality is a requirement for success for a 'purist' approach whereas it is self evident that mediators who are conducting 'power' or 'muscle' mediations are undeniably partial in some way shape, or form.<sup>393</sup>

The eminent mediation scholars and practitioners, Rifkin, Millen and Cobb have also critiqued the notion of neutrality within mediation and refer to the paradoxical description of neutrality as both a means and an end in the practice of mediation as the equivalent of folk lore.<sup>394</sup> These authors' view of the prevalence of the use of 'equidistance' within mediation, which is the practice of the mediator temporarily aligning herself with the parties, on an equal basis, so as to assist and encourage them to fully describe their perspective on what happened, is actually contradictory to the traditional notion of impartiality. It is worthy of note that it is not uncommon for Ombuds and facilitators to use

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<sup>391</sup> A. Taylor, "Concepts of 'neutrality' in Family Mediation: Contexts, Ethics, Influence and Transformative Process" (1997) 14 (3) Spring Mediation Quarterly 215 at 223.

<sup>392</sup> J. Hennikoff & M. Moffit, "Remodeling the Model Standards of Conduct for Mediators" (1997) 2 Harvard Negotiation Law Review 87 at 101.

<sup>393</sup> James D.D. Smith, "Mediator Impartiality: Banishing the Chimera" (1994) 31 Journal of Peace Research 445 at 448.

<sup>394</sup> J. Rifkin, J. Millen & S. Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality" (1991) 9 (2) Winter Mediation Quarterly 151 at 152 - 153.

the same practice, intentionally or not, to get sufficient information out in order to determine how to best proceed.

The same confusion evident within the field of mediation can be observed in the Ombuds world. Hybrid Ombuds may describe their practice as 'neutral' or refer to themselves as a 'designated neutral' in their promotional or educational materials when in fact they form opinions after conducting an investigation and/or they make recommendations for systemic or system-wide improvements. They argue 'neutral' still does apply because in conducting their investigations and forming conclusions and making recommendations they looked at the matters under discussion 'impartially'. Some take a different route and say 'neutrality' is still an acceptable descriptor as the recommendations flowing from their findings are non-binding on the institution. In addition, those Ombuds who do not make determinations on fairness also have a responsibility to think about the correct use of the term 'neutral' as they make decisions daily about how to handle complaints in the sense of determining whether or not to intervene or simply to provide information and referrals. As a result, the continuing usage of the term 'neutral', in my view, in relation to Ombuds, (and other third parties who assist with the resolution of disputes) is also problematic.

However, there is an alternate point of view to what I have just proposed with respect to the importance and value of precise definitions. For instance, James Vice, the former Ombudsman for Loyola University in Chicago, opines "...neutrality is not something to be given an explicit and essential definition. Neutrality is not an essence; it is an absence. We must dance around it with enough synonyms and examples to be able to



recognize when "it ain't present".<sup>395</sup> I would respectfully disagree. Given there is a multiplicity of differing definitions in existence as well as those that are contradictory, to then say the term should be indefinable or enigmatic is not a helpful addition to the dialectic on this subject. As a result, Vice's approach only serves to complicate Morris' 'confusing discourse'<sup>396</sup> further by making one of the terms under discussion and the underlying concept itself ephemeral when it should actually be sufficiently well formed that it can be the subject of critical analysis.

While the existence and proliferation of these modifications or equivocations relative to the use of the term 'neutrality' create a considerable conundrum not only for scholars and practitioners from an analytic perspective, it is even more problematic for those who are about to engage with a 'third party neutral', a 'designated neutral', an adjudicator, an Ombudsperson, or a mediator who describes himself as 'neutral' as the disparate foregoing views on this topic demonstrate how difficult it would be to know what to expect. In addition, all of the abovementioned commentary demonstrates how unwise it is to operate on the premise that impartiality and neutrality are synonyms describing the same concept.

#### Clarification of the Difference between Neutrality and Impartiality by Two Supreme Court Jurists

Fortunately, the differentiation between these two terms in the Canadian judicial arena was clearly articulated in *R. v. R.D.S (R.D.S)*<sup>397</sup> by Justices McLachlin and L'Heureux Dubé who stated "...Judges, while they can never be neutral in the sense of

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<sup>395</sup> J.W. Vice, "'Neutrality', Justice and Fairness", online: (1997) California Caucus of College and University Ombudsman UCI Ombudsman: The Journal, 6 at 2 online: <<http://www.ombuds.uci.edu/JOURNALS/1997/neutrality.html>>.

<sup>396</sup> Morris, *supra*, note 385.

<sup>397</sup> *R.v. R.D.S. (R.D.S.)*, [1997] S.C.J. No. 84 (QL) at (2) per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.

being purely objective, must strive for impartiality".<sup>398</sup> Chief Justice McLachlin expanded on this thesis to say not only it is impossible for judges to be neutral by expunging their experiences and knowledge, rather we should not want them to do so as it is all that a judge has learned and experienced that has equipped her to adjudicate in a way that is "...fair and wise".<sup>399</sup>

This distinction was made between 'neutrality' and 'impartiality' as a result of adjudicating the charge of a reasonable apprehension of bias against Justice Sparks of Nova Scotia who had dismissed three charges resulting from the following circumstances: A black fifteen-year old (R.D.S.) was riding his bicycle and either 1) stopped to see what was going on when he saw a crowd gathered around a police car; learned that his cousin had been arrested and then inquired as to whether he should tell the arrested youth's mother what had happened (R.D.S.'s version of what happened); or, 2) R.D.S. while riding his bicycle ran into the legs of a white police officer, yelled at him and pushed him while he was standing by the side of the road (the police officer's version of what happened). R.D.S. was charged with: "...unlawfully assaulting a police officer; unlawfully assaulting a police officer with the intention of preventing an arrest; and unlawfully resisting a police officer in the lawful execution of his duty".<sup>400</sup> The Crown's rationale for appealing the dismissal of R.D.S.' charges was predicated on Judge Sparks' observations that while she had not concluded that the police officer had been untruthful in his testimony in this instance, police officers had been known to do so previously; and secondly, that while she had not concluded that the officer in this case had overreacted, it

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<sup>398</sup> *Ibid.*

<sup>399</sup> Beverley McLachlin, "On Impartiality" in *A Canadian Judgment The Lectures of Chief Justice Beverley McLachlin in New Zealand* Eds. Andrew Stockley and David Rowe (Christchurch: The Centre for Commercial & Corporate Law Inc., 2004) 1 at 7.

<sup>400</sup> R.D.S., *supra* at note 397 at 62.

had been her experience that police officers do overreact especially when dealing with groups that are not white.<sup>401</sup> In commenting on the Supreme Court decision which ultimately found that Judge Sparks was not biased, Richard Devlin refers to the principle of impartiality as a shibboleth<sup>402</sup> and notes that Chief Justice McLachlin and Justice L'Heureux Dubé have determined "...objectivity and neutrality are chimeras in the world of judging...".<sup>403</sup> Simultaneously, Devlin appears to take exception to the willingness of these justices to abandon neutrality and objectivity while maintaining the possibility of impartiality<sup>404</sup> as he believes they have done so without providing sufficient foundation for how impartiality can be achieved.<sup>405</sup> He notes if a judge does make use of perspectives which are reflective of what she has experienced and learned as well as the characteristics of her identity, she is in danger of being seen to be biased as was purported by the Crown and the Nova Scotia Appeal Court in *R.D.S.* He emphasizes how Judge Sparks, a black woman, who was accused of bias for taking social context into account when making her decision about the actions of a young black man and a white police officer, conflicts with the 'bar and bench' expressed desire to create a more diverse judiciary, specifically, increasing diversity with respect to race and gender. The obvious question is: if one is not allowed to make use of 'difference' that is acquired through place of birth, social location, personal knowledge and experience when deciding cases, what is the point of the recommendations put forward in the much heralded ten year anniversary

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<sup>401</sup> *Ibid.* at para 1.

<sup>402</sup> Richard F. Devlin, 'We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*' (1995) 18 *Dalhousie Law Journal* 408 at 409.

<sup>403</sup> Richard F. Devlin & Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role after *R.v.R.D.S.*" (1999 – 2000) 31 *Ottawa Law Review* 1 at 18.

<sup>404</sup> *Ibid.* at 17.

<sup>405</sup> *Ibid.* at 19.

of the Touchstones<sup>406</sup> report? For example, in an effort to create a more diverse bench the following recommendations were made in 2003:

The CBA and the Federal Department of Justice review the criteria for judicial appointments to identify and eliminate systemic barriers in the current appointment process. Particular focus should be given to having Aboriginal judges and judges from racialized communities at appellate levels.

That the Office of the Commissioner for Federal Judicial Affairs for the federal judiciary and the departments or bodies which make judicial appointments for the provincial and territorial judiciary gather statistics on the representation at all levels in the judiciary of women and members of minority groups and keep the same up to date.<sup>407</sup>

Even with this type of effort in place to increase the diversity of the judiciary it was disappointing to learn that federal appointments with respect to the representation of women have decreased dramatically of late. In 2011, 41 men and 8 women (20%) were appointed to federal judgeships. In 2010, 37 men and 13 women (35%) were appointed. In comparison, in 2005, 40% of the federal appointments were women.<sup>408</sup> No explanation for this trend was provided by the government spokesperson quoted other than she indicated that since the current government has been in power, 30% of the appointees have been women, which is reflective of the volume of women who apply and the committee that makes the recommendations.<sup>409</sup> Given the number of women practicing in the field has increased dramatically in the last two decades it's odd that there would not be a large pool of candidates who are women to choose from in order to populate the bench in a manner more consistent with demographic realities.

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<sup>406</sup> Canadian Bar Association (CBA), Annual Equity Report "TEN YEARS into the future: **WHERE ARE WE NOW AFTER TOUCHSTONES?**" 1993-2003, (August 2003). "Touchstones for Change: Equality, Diversity and Accountability" is the report created by the CBA Task Force lead by Justice Bertha Wilson which was published in 1993 and contained 200 recommendations.

<sup>407</sup> *Ibid.* at 33, 10.4t.

<sup>408</sup> Kirk Makin, "Gender Imbalance Appointments of female judges slump under Harper's Tories" (11 November 2011) *The Globe and Mail*.

<sup>409</sup> *Ibid.*

An even more shocking statistic was released subsequently that demonstrated that out of 100 federal appointments to the bench made over the past two and a half years, 98 of the appointees are white.<sup>410</sup> The government has not provided any rationale for this outcome given the potential pool of racialized candidates is significant. Instead, in defending the quality of the appointment process, Julie Di Mambro, is quoted as speaking on behalf of the Justice Department, indicating that the selection process was guided both by legal excellence and merit.<sup>411</sup>

Interestingly enough, in an indication of further progress being made in the diversification of the judiciary, the Touchstones report pointed out that the Canadian Judicial Council had "...adopted a resolution approving the "concept of comprehensive, in-depth, credible education programs on social context issues which includes gender and race"<sup>412</sup> which had previously been delivered to judges by the National Judicial Institute. In the same trajectory but using different means, it was advanced that "...Recognizing the principle of judicial independence, the CBA recommends that the judiciary assume the responsibility to educate itself regarding the social context in which judicial decision-making takes place, including gender and racial issues".<sup>413</sup>

Sonia Lawrence argues for a more comprehensive and foundational approach to increasing the potential for impartiality on the bench by expanding on the importance of the members of the judiciary being not only diverse but actually reflective of and representative of the population it serves through its adjudication of both private and public

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<sup>410</sup> Kirk Makin, "Of 100 new federally appointed judges 98, are white, Globe finds" *The Globe and Mail* (17 April 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>411</sup> *Ibid.*

<sup>412</sup> Canada Bar Association, *supra* note 406.

<sup>413</sup> *Ibid.* at 10.6t.

disputes.<sup>414</sup> Lawrence makes reference to the value of 'structural impartiality', the term coined by Sherrilyn Ifill, which results from dialogue informed by a wide variety of perspectives such that the possibility of the domination of one particular viewpoint is reduced.<sup>415</sup>

Notably, the Supreme Court did decide, not unanimously, but by a slight majority, (i.e. per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ), to dismiss the claim that Justice Spark's decision was biased because she did take social context as it relates to racial issues into account, and her original decision was upheld.<sup>416</sup> The machinations of various Courts in relation to *R.D.S.*, and their differing decisions, leads inexorably to the important discussion of how judges and adjudicators (and perhaps even other dispute resolvers) actually go about making their determinations. The following discussion of theoretical models for decision-making and their application to various empirical studies will demonstrate how adjudicators make their decisions in some situations. I am investigating this research as foundational material for this study as the researchers' hypotheses, modes of analysis and findings are highly relevant to the discussion of the viability of the principles of independence and impartiality generally. It is also necessary as there has been no empirical work of a similar nature done in relation to Ombuds roles in any jurisdiction.

#### Models for Judicial Decision-making

There has been a great deal of research done with respect to the viability of the concepts of independence and impartiality in relation to decisions made by judges. This research is undertaken in an effort to determine if judges' political affiliations and/or policy

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<sup>414</sup> Sonia Lawrence, "Reflections: On Judicial Diversity and Judicial Independence" in Adam M. Dodek & Lorne Sossin, eds., *Judicial Independence in Context* (Irwin Law, 2010) (SSRN) 193 at 201.

<sup>415</sup> *Ibid.* at 199.

<sup>416</sup> *R.D.S.*, *supra* note 397.

preferences are evident in their decision-making, and hence affect whether or not they should properly be described as impartial and independent. For example, C.L. Ostberg and Matthew E. Wetstein observed that as early as 1881 the U.S. professor of law and Supreme Court jurist, Oliver Wendell Holmes Jr., was questioning the reality of judges actually 'finding the law' <sup>417</sup> rather than fashioning it to fit with their views. Similarly, Anna Miller, in her more recent analysis of the applicability of various decision-making models to the U.S. Supreme Court, observed that sixty years after Holmes' speculation, in 1941, Pritchett's research had determined that "...the justice's attitude (ideological or policy based) is paramount in determining his vote..." <sup>418</sup> Correspondingly, Donald Songer opined that Gordon Schubert in 1965 produced a well-defined theory for how judges' attitudes influence their decision-making by developing a system for 'scaling' which used judges' prior votes to predict the probability of future votes. <sup>419</sup> The work of Rhode and Spaeth published more than 35 years ago in 1976 is also reported on by Songer and others to demonstrate these researchers verified that Schubert's attitudinal scales for predicting decision-making by the U.S. Supreme Court was accurate "...for many decades". <sup>420</sup> James Stribopolous and Moin Yahya also point to the work of Schubert as pioneering in his use of a social psychology technique which allowed him "...to reveal the attitudinal commitments of individual judges..." <sup>421</sup>

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<sup>417</sup> C.L. Ostberg & Matthew E. Wetstein, *Attitudinal Decision-making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007) at 4.

<sup>418</sup> Anna L. Miller, "Judicial Decision-making on a Collegial Court: The Separation of Church and State", (Paper presented to 2005 Annual Meeting of the Southwestern Political Science Association, 23 – 26 March 2005) [unpublished].

<sup>419</sup> Donald R. Songer, *The Transformation of the Supreme Court of Canada An Empirical Examination*, (Toronto: University of Toronto Press, 2008) at 177.

<sup>420</sup> *Ibid.*

<sup>421</sup> James Stribopolous & Moin Yahya, "Does A Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study for the Court of Appeal for Ontario", (2007) 45 Osgoode Hall Law Journal 315 at 320.

Currently, the dominant modes for analyzing judicial decision-making are generally known as the attitudinal, legal and strategic models.<sup>422</sup> According to Andrew Green and Ben Alarie, the attitudinal model is based largely on research conducted in the U.S. and the research to date supports the belief that decisions are influenced to some degree by judges' ideological or political or policy predilections.<sup>423</sup> Others take a stronger view, specifically Donald Songer, who states the attitudinal model is founded on the belief that the justices' votes are explained *entirely* by their political ideology.<sup>424</sup> To support his conception of the strength of the attitudinal model, Songer quotes Segal and Spaeth as stating the degree of influence of attitudes is such "Even when the plain meaning of the text of the law or precedent is clear, 'they are easily avoided'".<sup>425</sup>

At the other end of the spectrum, the legal model, according to Green and Alarie, operates on the basis that judges' decisions are based only on the legal standards, the rules of statutory interpretation and *stare decisis*. They note this approach is also known as "... "idealist", "traditionalist" or "positivist" ...".<sup>426</sup> One of the best-known supporters of this tradition is H.L.A. Hart who wrote "Positivism and the Separation of the Law and Morals"<sup>427</sup> extolling the virtues of this approach. Legal theorist, Allan Hutchinson, describes

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<sup>422</sup> It is also instructive to look at Peter McCormick and Ian Greene's matrix for categorizing decision-making processes using the axes of formalism and discretion in *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lorimer & Company Ltd., 1990) at 123. This style of categorization deserves recognition as it emerged from the interview data acquired from sitting judges. The matrix includes: Model I: Improvisers (low formalism, low discretion); Model II: Strict Formalists (high formalism, low discretion); Model III: Pragmatic Formalists (high formalism, high discretion); Model IV: Intuitivists (low formalism, high discretion).

<sup>423</sup> Andrew Green & Ben Alarie, "Policy Preference Change and Appointments to the Supreme Court" (July, 2007), 2<sup>nd</sup> Annual Conference on Empirical Legal Studies online: SSRN: <http://ssrn.com/abstract=1013560> 1 at 10.

<sup>424</sup> Songer, *supra* note 419 at 176.

<sup>425</sup> *Ibid.*

<sup>426</sup> Green & Alarie, *supra* note 423 at 10.

<sup>427</sup> H.L.A. Hart, "Positivism and the Separation of Law and Morals", in R.M. Dworkin, ed., *The Philosophy of Law* (London; New York: Oxford University Press, 1977) at 22.



Hart as being almost singularly responsible for bringing "...analytical jurisprudence, especially in its positivist incarnation, squarely and decidedly back into vogue".<sup>428</sup>

The third model is strategic in nature and, according to Green and Alarie, "...assumes that judges do not "sincerely" or directly vote for their preferred policy outcome in each case, but instead they take into account how their votes in the particular case will affect and be affected by other actors such as other justices on the court and other institutions (such as the legislature or the media)."<sup>429</sup> In his description of this model, Songer also cites evidence of how the decisions made by justices from around the world have obviously been influenced by anticipated political changes, e.g. in Argentina, South Africa and Spain.<sup>430</sup> Miller quotes Epstein and Knight as defending the belief that "...law is a cumulative product of numerous short term strategic decisions made by the justices over various terms of the Court".<sup>431</sup> Keeping these models of judicial decision-making in mind, there are a number of recent studies of judicial decision-making that have important implications for the viability of the principle of 'impartiality' and concomitantly of 'independence' as they relate to political affiliation, known policy preferences and gender.

### Empirical Research Results

I will now review the results of six empirical studies released between 2006 and 2008 in the chronological order they appeared so as to demonstrate the increasing level of research interest in the viability of impartiality and independence related to judicial and quasi-judicial decision-making in both Canadian and U.S. settings. The progression in thinking about these essential principles is also demonstrated through the presentation of these results.

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<sup>428</sup> Allan C. Hutchinson, *The province of jurisprudence democratized* (Oxford; New York: Oxford University Press, 2009) at 3.

<sup>429</sup> Green & Alarie, *supra* note 423.

<sup>430</sup> Songer, *supra* note 419 at 180.

<sup>431</sup> Miller, *supra* note 418 at 10.

### U.S. Appeal Court Decisions (2006)

An important research study by Cass R. Sunstein, David Schakde, Lisa M. Ellman & Andres Swack published in 2006 focused on decisions made by federally appointed U.S. Appeal Court judges. The researchers examined 6,408 published decisions issued by Panels composed of three judges and 19, 224 associated votes of individual judges made, for the most part, in the time period from 1995 to 2004.<sup>432</sup> The researchers confirmed three hypotheses through their analyses and their findings will be presented sequentially. Firstly, the votes of judges in many important areas of law like protection of the environment, disability and sex discrimination, political campaign financing and more, can be accurately predicted on the basis of the political party in power at the time of their appointment and the President responsible for their appointment in that Republican and Democratic appointees voted differently.<sup>433</sup> Secondly, it was also evident that the impact of political ideology could be reduced or dampened by Panels made up of both Democratic and Republican appointees with two notable exceptions. Specifically, in cases involving capital punishment and abortion Panel members voted on the basis of their personal convictions regardless of the composition of the Panel.<sup>434</sup> Thirdly, the research revealed that ideological beliefs could be amplified by 'same party' Panels in some areas of law.<sup>435</sup>

These findings are also supported by an analysis done by Adam Liptak in his efforts to determine whether or not religious belief would be important in selecting a new justice for the U.S. Supreme Court given the 2010 resignation of Justice Stevens who was the only remaining Protestant on that bench. While Liptak was advised by Associate

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<sup>432</sup> Cass R. Sunstein, David Schakde, Lisa M. Ellman & Andres Swack, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Washington, D.C.: Brookings Institution Press, 2006) at 17, 18.

<sup>433</sup> *Ibid.* at 147.

<sup>434</sup> *Ibid.* at 56.

<sup>435</sup> *Ibid.* at 148.

Justice Ruth Ginsberg that society [presumably she's referring to only a part of American society] no longer worries about justices' religious affiliations <sup>436</sup> it would seem they should if the following analysis cited by Professor Geoffrey Stone of the University of Chicago Law School is accepted as being correct. That is, in 2007 the U.S. Supreme Court upheld federal legislation prohibiting partial birth abortion, at which point Stone observed in an op-ed piece in The Chicago Tribune that "All five justices in the majority in the *Gonzales* case are Roman Catholic" and "The four justices who are not followed clear and settled precedent". <sup>437</sup> In the same vein, Jeffrey Toobin in his analysis of *Gonzales v. Carhart* <sup>438</sup> pointed out that "...the expansiveness of [U.S. Supreme Court Justice] Kennedy's opinion [a Roman Catholic] (with its dismissive acknowledgements of the *Roe* and *Casey* precedents) left the four liberals on the Court shocked". <sup>439</sup> The outcome in *Gonzales* supports Sunstein et al's findings about federal Appeal court judges' voting patterns as all five U.S. Supreme Court justices who went against settled law and precedent in this case cast votes consistent with the political platforms of the Republican Presidents who appointed them as well as, by chance or intent, the teachings of the Roman Catholic Church. It is also noteworthy that four of the five judges who voted in favour of precedent are considered to be the justices who most consistently favour argumentation in favour of 'liberal' positions.

Sunstein et al also observed important trends when cases are being decided based on laws that this group of researchers has identified as being ambiguous and containing many gaps and uncertainties, such as the *Clean Air Act*, *Federal*

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<sup>436</sup> Adam Liptak "Stevens, the only Protestant on the Supreme Court" *The New York Times* (11 April 2010) at 3.

<sup>437</sup> *Ibid.*

<sup>438</sup> *Gonzales v. Carhart*, 05-380 U.S. (2006) (QL).

<sup>439</sup> Jeffrey Toobin, *The Nine Inside the Secret World of the Supreme Court* (New York: First Anchor Books Edition, 2008) at 381 – 382.

*Communication Act*, and *National Labor Relations Act*.<sup>440</sup> The statistical data representing the voting patterns of Republican and Democratic appointees, demonstrate that these two groups regularly make readily discernable "...different judgments about both policy and principle"<sup>441</sup> on what appears to be an ideological basis. This finding is particularly important as the type of legislation noted above necessarily has a huge impact on individuals' health and well-being and how their governing bodies operate. In these instances, the lack of clarity and direction in the statutes themselves provides multiple opportunities for ideological beliefs to influence the votes rendered by individual judges.

Secondly, Sunstein et al concluded the voting behaviour of judges is dampened by the addition of one appointee of another party.<sup>442</sup> For example, a Republican appointee on a Panel with two Democratic appointee's votes in a liberal manner 55% of time while a Republican appointee sitting with two other Republican appointees issues a liberal vote only 23% of the time. In comparison, a Democratic appointee sitting with two Republicans issues a liberal vote 50% of the time and when a Democratic appointee is sitting with two other Democratic appointees liberal votes are made 75% of the time.<sup>443</sup> One rationale suggested for these striking differences is the powerful desire of justices to behave in a collegial manner<sup>444</sup> which overcomes their political preferences. Or, it was speculated that the judge who does not share the dominant political affiliation may take on the role of 'whistle blower' and in doing so, may be successful in persuading her fellow Panel members to more carefully consider the legal arguments made.<sup>445</sup>

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<sup>440</sup> Sunstein et al, *supra* note 432 at 132.

<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid.* at 148.

<sup>443</sup> *Ibid.* at 30.

<sup>444</sup> *Ibid.* at 65.

<sup>445</sup> *Ibid.* at 79.

Thirdly, the Sunstein et al data demonstrates that ideological orientations which are recognized as stereotypically 'liberal' or 'conservative' points of view can be amplified by the composition of a Panel of all Republican and Democrat appointees. For example, Panels made up of Democratic appointees voted in favour of affirmative action plans 81 percent of the time whereas Panels composed of all Republican appointees did so only 34 percent of the time.<sup>446</sup> It is noteworthy that Sunstein et al state "A litigant who draws three Democratic appointees will often have very different prospects than a litigant who draws three Republican appointees".<sup>447</sup> This finding demonstrates very clearly that the traditional belief of justice being meted out on the basis of the facts and the law can not be sustained for many different types of cases.

While Sunstein et al indicate that a variety of perspectives, based on the notion of "...reasonable diversity or diversity of reasonable views..."<sup>448</sup> is an important principle, they are not prepared to recommend U.S. federal judicial appeal Panels be composed so as to provide for as much as diversity as is possible as they believe to do so would be such a complex undertaking. Unfortunately, from my vantage point, given the value that can be found in a variety of perspectives being taken into account when analyzing issues of life-changing proportions, the authors do not put forward any rationale for why the logistical complexity they envision is so daunting. Their conclusion is surprising given their findings demonstrate unequivocally that political diversity, in particular, in the composition of a Panel would contribute to more in-depth deliberation when deciding cases in areas of law with far-reaching implications.<sup>449</sup>

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<sup>446</sup> *Ibid.* at 25.

<sup>447</sup> *Ibid.* at 45.

<sup>448</sup> *Ibid.* at 138.

<sup>449</sup> *Ibid.*

These findings go to the heart of the notions of impartiality and independence as the strength of the impact of political affiliation demonstrates unequivocally that it can not be assumed or blithely stated that by a decision-maker taking an oath of office and enjoying a high degree of structural independence an unbiased view will result. These data reinforce the reality of the influence of political affiliation or a strongly held personal opinion on judges' decisions. In response to these particular data, it is important to acknowledge that if justice is seen to be the result of carefully considered argumentation, and by taking into account a wide variety of perspectives, significant changes as to how Panels are assembled should be a priority.

#### Ontario Appeal Court Decisions (2007)

James Stribopoulos and Moine Yahya's research findings which relate to Ontario appeal court judges are also illuminating. They investigated whether party of appointment and additionally, gender, should matter to litigants who appear before them; and concomitantly, from a societal perspective, whether the principles of impartiality and independence are viable. Specifically, the study assessed every reported decision made by the Ontario Court of Appeal between 1990 and 2003. This time period yielded over 4000 decisions and 12,000 individual votes.<sup>450</sup> As was found in the Sunstein et al study discussed earlier, the Canadian research also demonstrated a high degree of unanimity in that in 95% of the cases heard, all of the judges on the Panel came to the same conclusion.<sup>451</sup> However, it is worth noting that the consensus of opinion went up to 99% for

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<sup>450</sup> Stribopoulos & Yahya, *supra* note 421 at 318.

<sup>451</sup> *Ibid.*

narcotics cases and went down to 93% for sexual assault cases.<sup>452</sup> Against this backdrop, the two variables that were explored in this study are political affiliation and gender.<sup>453</sup>

#### Influence of Political Affiliation

The centrality of the expectation of, and in fact requirement for judicial impartiality within our legal system informed Stribopoulos and Yahya's methodology in that they specifically chose party of appointment as one of their explanatory variables as if political affiliation was irrelevant there should be no patterns of voting that indicated otherwise.<sup>454</sup> Theoretically speaking, when beginning from a positivist perspective, the judicial appointment process should not result in any observable patterns in decision-making in comparison to political ideologies. That is, if appointees are chosen for "...their legal excellence and merit"<sup>455</sup> rather than the expectation being that they will judge in a manner that is consistent with the government that appointed them no trends should be evident. However, Stribopoulos and Yahya found statistically significant differences in judges' voting patterns depending on party of appointment in criminal cases where remedies under the *Canadian Charter of Rights and Freedoms (the Charter)* were claimed. For instance, it was apparent that Conservative appointees voted for more conservative results and Liberal appointees favoured more liberal conclusions, though they did so by making finer distinctions.<sup>456</sup> This finding is important as if a Panel of judges was populated by individuals who were not influenced by their political affiliations or stereotypical thinking, that is, if the jurists were adjudicating on the basis of the facts of the cases before them; considering what had transpired from a variety of perspectives and taking into account

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<sup>452</sup> *Ibid.*

<sup>453</sup> These researchers modeled their study after the Sunstein et al 2005 study that demonstrated the variable of political affiliation was determinative with respect to U.S. appeal court judges' decision-making patterns. It is important to note that these variables are readily quantifiable categories and therefore not dependent on perception or subjective analysis.

<sup>454</sup> *Ibid.* at 332.

<sup>455</sup> Kirk Makin, *supra* note 408.

<sup>456</sup> Stribopoulos & Yahya, *supra* note 421 at 332.

points of view that are different than their own, one would not expect to be able to regularly match conservative outcomes with Conservative appointees and liberal outcomes with Liberal appointees.

Interestingly enough, however, as was also observed by Sunstein et al in their analysis of U.S. appeal court decisions,<sup>457</sup> Stribopoulos and Yahya found the presence of one appointee from the other political party had a marked dampening effect on the final decision.<sup>458</sup> Specifically, when criminal cases with *Charter* claims involving requests to reject evidence were decided, Panels made up of appointees from both political parties affirmed the conviction of the accused in 70% of the cases heard, whereas Panels made up of only Conservative appointees affirmed 65% of the cases and those Panels made up only of Liberal appointees affirmed the conviction at the much higher rate of 87%. Stribopoulos and Yahya concluded that since the affirmation rates of single party Panels, when averaged, was close to the affirmation rate of the Panels made up of a mixture of appointees, (i.e. 70%) the sheer placement of one person with a different political point of view could overcome the trend established by Panels populated by justices appointed by the same political party.<sup>459</sup>

The affirmation and rejection of cases involving human rights also yielded surprising outcomes. For a claimant who did not prevail at trial when claiming a human right had been violated, mixed party Panels upheld the conviction in 70% of the cases whereas Panels made up of Liberal party appointees upheld at the much higher rate of 85% and Panels made up of Conservative party appointees upheld at the rate of 80%.<sup>460</sup> The researchers' speculated that these unexpected results, that is, the lower rate of

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<sup>457</sup> Sunstein et al., *supra* note 432 at 132.

<sup>458</sup> Stribopoulos & Yahya, *supra* note 421 at 347.

<sup>459</sup> *Ibid.*

<sup>460</sup> *Ibid.* at 348.



affirmation for Panels made up of both party appointees was that the lack of a shared normative standard based on differing political beliefs may have forced the mixed Panel members to look at the cases in a more thoughtful manner.<sup>461</sup> For example, one might speculate that when confronted with a different perspective, the mixed Panel model required the jurists with opposing view points to look more carefully at the issues and examine their initial reactions to determine if they were being influenced solely by personal ideology or by past experiences which were irrelevant. One could speculate that this type of analysis may also have reduced the potential for 'group political think' and forced the utilization of a more in-depth and deliberative decision-making process overall.

#### Influence of Gender

The area that provided for more dramatic results was gender. While there were no obvious patterns of difference between how male and female judges voted in many areas of law, the researchers identified some key areas where gender made a difference. For example, judges who are women were more likely to support the interests of mothers and complainants in criminal cases involving sexual or domestic violence as well as in cases involving custody or support. In comparison, male judges were more supportive of the accused person and fathers.<sup>462</sup> If judges were not influenced by their personal experiences as a man or a woman, or as a parent or child, or did not feel sympathy for litigants of their particular gender, would this finding have emerged? The troubling spectre that emerges from this evidence is the possibility that an unexamined gender stereotype or personal antipathies could have undue influence. However, taking into account social context and being appropriately informed by judges' own and others' experiences rather than being driven by known and unknown prejudices such as classism, racism, sexism, and/or

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<sup>461</sup> *Ibid.*

<sup>462</sup> *Ibid* at 319.

ageism, is recognized to be both a fair and reasonable approach. As it is impossible to know what information the judges took into account when making their decisions, we do not know whether the apparent bias is, as coined by Patricia Cain, 'Good and Bad Bias'.<sup>463</sup> For example, Chief Justice Beverly McLachlin identified good biases as "... predispositions to fairness, equality and protection of the weak and the vulnerable...the rule of law; justice..."<sup>464</sup> Notably, as identified earlier, while the effect of gender was not predictable for many areas of law, in looking at the differences in voting patterns between male and female judges Stribopolous and Yahya observed that "...none is more pronounced than the difference between male and female judges in cases involving sexual and domestic violence".<sup>465</sup> Specifically, in these types of cases, if the Crown appealed the sentence, individual male judges allowed the appeal at a rate of 67% whereas female judges allowed the appeal 91% of the time. Also, when the Crown appealed cases that have been acquitted, male judges voted to reverse the acquittals 64% of the time while female judges reversed 85% of the time.<sup>466</sup> As the research methodology focused on decisions only and there was no interview data to examine, it is not possible to state why these staggering differences emerged in male/female voting patterns. Once again, theoretically speaking, if the positivist view was in play then there should be no deviation evident on the basis of gender, given in that tradition, both men and women should be able to equally apply clear rules on the proper disposition of sexual and domestic assault cases. However, in this instance, it must be acknowledged that we do not actually know whether good or bad biases are in play. Nonetheless, as stated by Stribopoulos and Yahya their empirical work

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<sup>463</sup> Patricia A. Cain, "Good and Bad Bias: A Comment on Feminist Theory and Judging" (1987 - 1988) 61 South California Law Review 1945 at 1945.

<sup>464</sup> Beverly McLachlin, *supra* note 399 at 7.

<sup>465</sup> Stribopoulos & Yahya, *supra* note 421 at 354.

<sup>466</sup> *Ibid* at 356.

has now validated the proposition made by the Honourable Madam Justice Bertha Wilson in "Will Women Judges Really Make Difference?" that the inclusion of perspectives of women within the judiciary will result in different outcomes in some areas of law.<sup>467</sup>

Given the fact that the researchers used two explanatory variables, they being, gender and political appointment, it is also possible to look at the influence of both gender and political affiliation in relation to individual judges' voting patterns. It is worthy of comment that when an appellant who is a man involved in a family law matter came forward, Conservative appointees allowed the appeal in 43% of the cases whereas Liberal appointees only did so in 33% of the cases. This statistic demonstrates that appellants who are men, in this area of law, had a ten percent greater chance of success with Conservative appointees.<sup>468</sup> This type of information could be put to good use by litigants in attempting to determine the best venue and composition of the bench for achieving their preferred outcomes. As there were twenty-eight judges who are men and eight judges who are in women in the researchers' sample<sup>469</sup> it is readily apparent that if the Ontario Court of Appeal bench was representative of the actual population<sup>470</sup>, (that is, men and women were represented on an equal basis, rather than the 22% women and 78% men breakdown shown in this study), there is a strong likelihood of even more dramatic differences in success rates depending upon the gender composition of the Panel hearing the appeal.

In summary, in looking at all of the data, it was determined that both party of appointment and gender had an impact on outcomes, and that gender had the most

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<sup>467</sup> *Ibid.* at 354.

<sup>468</sup> *Ibid.* at 355.

<sup>469</sup> *Ibid.* at 332.

<sup>470</sup> Statistics Canada indicates that 49.6% males and 50.4% females made up the Canadian population on July 1 in 2009. See "Proportion by Sex and Age Group by Province and territory" at [www.statcan.gc.ca](http://www.statcan.gc.ca) for more details.

significant impact.<sup>471</sup> In observing these conclusions the researchers stated unequivocally that the unproven assumption of unbiased judicial decision-making could not be substantiated.<sup>472</sup> For many this outcome will not be surprising as it would never have occurred to them judges would be automaton-like in their deliberations and prove Thomas Nagel's notion of the possibility of the existence of the 'view from nowhere'.<sup>473</sup> Nagel coined this metaphor to explain how an individual can combine his own world view with an objective view of the world he lives in. While Nagel has acknowledged that "We see things from here, so to speak."<sup>474</sup> he also contends we are able to abstract ourselves from our individual perspective and develop an "...impersonal standpoint".<sup>475</sup> While making this statement he acknowledges that regardless of how committed an individual or an institution is to acting in an impartial and egalitarian manner it must also be accepted that the 'personal' perspective is also still present.<sup>476</sup> Chief Justice McLachlin comments on Nagel's view by acknowledging the importance of the requirement for impartiality to prevail to "...to step back from her own motives...".<sup>477</sup> However, she posits that impartiality requires not the detachment from personal perspectives espoused by Nagel but "...an ability to imagine them all, in their full particularity".<sup>478</sup> While following Chief Justice McLachlin's prescription one would expect decision-makers will also be mindful of how important it is to attempt to prevent 'bad bias' or wrong information from informing their efforts when endeavouring to imagine others' perspectives.

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<sup>471</sup> Stribopoulos & Yahya, *supra* note 421 at 358.

<sup>472</sup> *Ibid.* at 362.

<sup>473</sup> Thomas Nagel, *The View From Nowhere* (New York: Oxford University Press, 1986) at 3.

<sup>474</sup> Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991) at 10.

<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid.* at 18.

<sup>477</sup> McLachlin, *supra* note 399 at 7.

<sup>478</sup> *Ibid.*

In contrast to Sunstein et al's theoretical speculation on the potential value of establishing more diverse Panels on the basis of gender and political affiliation, Stribopoulos and Yahya specifically proposed that the Registrar who currently determines the composition of Panels for the Ontario Court of Appeals should actually be ensuring diverse Panels are composed with respect to party of appointment and gender so as to reduce the potential for polarization around either ideology or gender.<sup>479</sup> Further, it seems reasonable to expect that such an innovation would also reduce actual bias in decision-making as a result of greater diversity in Panel members' perspectives and exposure to and interaction with jurists who have had different life experiences and opposing perspectives on the matters of considerable import that come to the attention of appeal court judges. Having access to greater depth and breadth of experience and knowledge would also increase the degree and quality of deliberation on a more general basis. However, the information referred to earlier detailing federal judicial appointments over the past three years which illustrated the low percentage of women judges appointed as well as the virtual non-representation of racialized judges does not bode well for any Registrar's capacity to create diverse benches.<sup>480</sup> Unfortunately, this recommendation for reducing partiality and increasing independence is not applicable to the majority of ADR practitioners as typically they work alone and if they are making decisions, they do so as a sole decision-maker, rather than as a bench of equals.

First Analysis of Canadian Supreme Court Decisions (2007):

C.L. Ostberg and Matthew E. Wetstein specifically designed their study to assess whether the attitudinal model of decision-making was applicable to the Canadian Supreme

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<sup>479</sup> Stribopoulos & Yahya, *supra* note 421 at 363.

<sup>480</sup> Makin, *supra* notes 408 and 410.

Court as it has been found to be in various levels of judicial decision-making in the U.S.<sup>481</sup> These researchers were interested in finding out if judges' decisions could be predicted based on knowing the political party of the Prime Minister who appointed them and their known ideologies. As there have been critiques of the validity of the use of 'party of appointment' for identifying conservative or liberal voting patterns these researchers used a complex factor analysis method to determine the probability of a liberal vote through the use of a mathematical equation. Specifically, the two variables used by the researchers to measure whether or not the judges' liberalism or conservatism influenced their votes were 1) the impact of the perception of the judge's degree of liberalism and 2) the facts of the case.<sup>482</sup> The researchers also included a factor analysis to control for other variables. The factors taken into account for predictive purposes were: the perception of the judge's ideology taken from an analysis of opinions published in nine different newspapers<sup>483</sup> from across the country; the judge's personal characteristics, (e.g. gender); the area of law in which they practiced beforehand; the facts of the cases before them; the personal characteristics of the parties and the intervenors appearing before them; which Chief Justice they worked with; and unexplained variances.<sup>484</sup> In their final analysis, Ostberg and Wetstein declared their findings demonstrate that the attitudinal model of decision-making was in play in that it was evident that the jurists were influenced by their political preferences. This outcome again contradicts the traditional notion of judgments being made solely on the basis of indifferent legal analysis.

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<sup>481</sup> Ostberg & Wetstein, *supra* note 417 at 3.

<sup>482</sup> Ostberg & Wetstein, *supra* note 417 at 13.

<sup>483</sup> The newspapers listed at 49 include: The Globe and Mail self identified as Canada's national news paper and published in Toronto; Ottawa Citizen, Halifax Chronicle-Herald, The Gazette (Montreal), Toronto Star, Winnipeg Free Press, Calgary Herald, Edmonton Journal, and Vancouver Sun.

<sup>484</sup> Ostberg & Wetstein, *supra* note 417.

Interestingly enough, another political scientist, Emmett Macfarlane, has taken umbrage with the validity of Ostberg and Wetstein's findings as he found their determination of what is a 'liberal' or 'conservative' vote wanting. For example, while he recognizes their methodology is sophisticated, he believes there is still an element of circular logic in play when they define what is a 'conservative' or a 'liberal' vote.<sup>485</sup> Specifically, he contends the judges' perceptions of the nature of their role, (e.g. whether it is to be deferential or an activist jurist), may in fact determine how they vote rather than they being motivated by their political ideologies.<sup>486</sup> However, in my view, while Macfarlane's point is valid to some degree from a theoretical perspective, the sheer volume of votes cast is such that I believe it is possible to draw conclusions about where a justice fits on the ideological spectrum in relation to what is well known to be traditionally 'liberal' and 'conservative' political platforms. In addition, Macfarlane acknowledges that Ostberg and Wetstein also recognize their findings do not provide sufficient specificity to pigeon-hole each justice with a definitive ideological stance.<sup>487</sup> However, Ostberg and Wetstein are unequivocal in their assessment that the majority of justices demonstrate a consistent attachment to some degree of a readily discernable political ideology and it is only a few justices that are impossible to categorize.<sup>488</sup>

The Ostberg and Wetstein study included all of the cases decided by the SCC from 1982 (post proclamation of the *Charter*) to 2003. The indicators of the applicability of the attitudinal model can be seen most clearly in their findings related to criminal matters. For example, they found in cases not receiving unanimous support, the judges who were

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<sup>485</sup> Emmet Macfarlane, "Book review of Attitudinal Decision-making in the Supreme Court of Canada", 33 Queen's Law Journal, (2007 – 2008) at 253/254.

<sup>486</sup> *Ibid.* p. 254.

<sup>487</sup> *Ibid.* at 258.

<sup>488</sup> Ostberg & Wetstein, *supra* note 417 at 209.

identified as most liberal were much more likely to side with 'the individual', that is 72% more likely, in right to counsel cases and 44% more likely to support the individual in search and seizure cases, than their more conservatively ranked colleagues.<sup>489</sup> It is also noteworthy, while not surprising given the findings of Sunstein et al and Stribopoulos and Yahya cited previously, that Ostberg and Wetstein's research also revealed gender differences were a significant influencing factor in some areas of law. For example, in the area of free speech, justices who are women were 34% more likely than their counterparts who are men to vote in a liberal fashion.<sup>490</sup> In addition, they observed all of the justices who are women who have been appointed since the *Charter* have cast liberal votes for civil rights and liberties cases. This finding confirmed for the researchers "...the women on the Court have developed a unique feminist approach toward these types of rights claims".<sup>491</sup> Once again Justice Wilson prescience that women appointees would approach the adjudication of disputes differently has also been proven by another study of considerable magnitude. Unfortunately, from my perspective, these researchers did not consider the impact of ethnicity or religion on decision-making patterns. For obvious reasons, race could not be considered as all SCC jurists, to date, are white and it would be impossible to know the race of all the litigants' whose cases were being decided.

#### Second Analysis of Canadian Supreme Court Decisions (2007)

Andrew Green and Ben Alarie also assessed the decisions made by the SCC using much different approaches than the researchers previously cited.<sup>492</sup> An empirical analysis was undertaken by assessing all SCC decisions issued from 1982 to 2004 and reviewing newspaper accounts of the jurists' points of view on various issues prior to

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<sup>489</sup> *Ibid.* at 113.

<sup>490</sup> *Ibid.* at 151.

<sup>491</sup> *Ibid.* at 152.

<sup>492</sup> Green & Alarie, *supra* note 423 at 1.



appointment<sup>493</sup> and then ranking them numerically as to how liberal or conservative they were by using the Cover-Segal<sup>494</sup> scoring method.<sup>495</sup> These researchers looked at political affiliation differently than Ostberg and Wetstein in that they looked at judges' choices in comparison to the political philosophy of the Prime Minister who appointed them and found judges' decisions often diverged dramatically from what would be considered Liberal or Conservative 'party lines' rather than being consistent with the views of their party of appointment. As a result, Green and Alarie's data demonstrated there is not a strong relationship between the political ideology of the Prime Minister who appoints the judge and their subsequent voting pattern. It is noteworthy that of the four judges who provided the most "conservative" decisions, three were appointed by Liberal Prime Ministers.<sup>496</sup> For ease of understanding the descriptors used for each category of votes, I am summarizing and presenting the criteria used to demonstrate whether or not a decision is considered liberal or conservative<sup>497</sup> in chart form:

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<sup>493</sup> *Ibid.* at 12.

<sup>494</sup> The Cover-Segal scoring system was developed by Jeffrey A. Segal and Albert D. Cover so as to provide a numeric value (from -1.0 to +1.) for the degree of 'liberalism or conservativeness' evident in the newspaper editorials about U.S. Supreme Court Justices. Ostberg and Wetstein used a similar methodology for Canadian judges using a numerical range of -2/0 for very conservative to +2.0 for very liberal to rank individual Canadian judges "...overall approach to the law in general as well as to specific areas of law" from Ostberg and Wetstein, *supra* note 417 at 55.

<sup>495</sup> Green and Alarie, *supra* note 423 at 14.

<sup>496</sup> *Ibid.* at 23.

<sup>497</sup> *Ibid.* at 16.

Table 2: Criteria used by Alarie and Green to Determine if a Vote for a Decision is Conservative or Liberal

Votes on:	Conservative Vote	Liberal Vote
Charter appeals	In favour of the government	In favour of the claimant
Criminal appeals	In favour of the prosecution	In favour of the defendant
Labour appeals	In favour of employer, business interest	In favour of a union, labour organization, worker
Tax appeals	In favour of taxpayer	In favour of government
Aboriginal rights appeals	In favour of government	In favour of aboriginal group or individual

Also, the perception of how the SCC justices would likely weigh in on particular types of cases based on newspaper accounts of the appointees' views on various social issues prior to being appointed was not borne out in their decisions. These data demonstrated judges' preferences do shift over time but it is very difficult to predict in what direction they will go.<sup>498</sup> Green and Alarie's specific observation was "...the dynamic results suggest that justices may behave in unexpected ways in their first term, and will then shift randomly from the initial voting behaviour".<sup>499</sup> By comparison with the U.S. Supreme Court as noted by Adam Liptak in his "Supreme Court Memo" in *The New York Times*, in the past there have also been a number of surprises when U.S. Republican presidents appointed individuals who they thought were conservatives who then moved to the left, that is, John Paul Stevens, David H. Souter, and Sandra O'Connor.<sup>500</sup> However, Liptak's analysis is that since 1990 the individuals who have been appointed have not

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<sup>498</sup> *Ibid.* at 36.

<sup>499</sup> *Ibid.* at 36.

<sup>500</sup> Adam Liptak, "Why Newer Appointees Offer Fewer Surprises From Bench" *The New York Times*, (18 April 2010) at 1. It is surprising that Liptak does not include Justice Blackmun in his identified list of defectors as his chart demonstrates that Justice Blackmun started out as conservative and moved dramatically to the left side of political spectrum over time.

been a disappointment from an ideological perspective. Rather the appointees "...have performed largely as expected..."<sup>501</sup> Liptak's thesis is that the current intense scrutiny of appointees' past performance on the bench and their CV's, especially whether or not they have worked in the executive branch of the government that has appointed them, has resulted in no surprises. He notes in particular Chief Justice John G. Roberts, Jr., Justice Antonin Scalia, Justice Clarence Thomas and Justice Samuel A. Alito Jr., all who worked for Republican Presidents, have stayed on a politically conservative course.<sup>502</sup> In looking at the chart developed by Liptak to illustrate the Justices' decision-making bent, it is noteworthy only Justice Kennedy who was nominated by a Republican president has tacked back and forth staying in the middle zone of Liptak's 'estimated ideology' of the Liberal/Conservative spectrum.<sup>503</sup> However, it is worthy of comment that as observed by Jeffrey Toobin, Justice Kennedy, who identifies as a Roman Catholic, was the author of the *Gonzales* decision that overturned settled law and in doing so favoured a Roman Catholic precept.<sup>504</sup>

On the face of it, the findings presented by Green and Alarie could lead the reader to be satisfied that contemporary Canadian Supreme Court judges, by comparison to the U.S., are indeed independent and impartial in relation to internal and external influences. However, Green and Alarie do not make this claim. Rather their conclusion is that the judicial appointment system for SCC judges has not become as politically polarized<sup>505</sup> as

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<sup>501</sup> *Ibid.*

<sup>502</sup> *Ibid.* at 18. It must be noted that Liptak's view was presented and this chart was prepared prior to Chief Justice Roberts' decision to support the constitutionality of 'Obamacare' (the *Affordable Care Act*) in *National Federation of Independent Business et al v. Sebelius, Secretary of Health & Human Services et al*, 567 U.S. S. Ct. (2012) in stark opposition to the expectation that he would fall in line with the Republican Party's policy platform on health care coverage.

<sup>503</sup> *Ibid.*

<sup>504</sup> Toobin, *supra* note 439.

<sup>505</sup> Green & Alarie, *supra* note 423 at 19.

it has in other jurisdictions even though these researchers observed there is some evidence to show Liberal appointees did vote differently than Conservative appointees.

The overall results could also lead the reader to conclude the majority of the judges made their decisions on the basis of the facts of the case. For example, it could be inferred they were using the 'legal' model of decision-making rather than attempting to please the party that appointed them or to apply their known' policy preferences as would be the case with the 'attitudinal' model for judicial decision-making.

However, the authors acknowledge that:

First, judges may be as likely to vote in accordance with their political preferences or attitudes in Canada as the U.S. but as stated by Ostberg and Wetstein due to "...historical patterns of judicial selection in Canada have ensured that justices with diverse characteristics, largely unrelated to their ideological leanings have been elevated to the Court.<sup>506</sup>

Thus, Green and Alarie conclude the Canadian selection process has resulted in judges being appointed to the SCC who are not driven by political ideology to the same extent that has been observed in the U.S. Supreme Court.

Green and Alarie used two analytical approaches to assess their data, namely, the (1) Direct Method and (2) Indirect Method: Martin-Quinn. The use of the Martin-Quinn approach is unique in that they state: "Importantly, the Martin-Quinn method does not assume that a vote to affirm or reverse in any given case is 'conservative' or 'liberal'.<sup>507</sup> As their data does not support the application of the 'attitudinal' model of decision-making to the SCC justices, the authors suggest a more sophisticated theory has to be developed that takes into account not only the reality of attitudinal, legal and strategic influences having impact on decision-making, but should also make use of newer theories such as

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<sup>506</sup> *Ibid.* at 40. While the term of 'diverse' is used to describe the SCC bench, we are aware that only geographical origins are diverse and that there are more women on this bench than in other common law jurisdictions.

<sup>507</sup> *Ibid.* at 39.

provided by Baum of the import and presumably the pervasiveness of the desire of judges to please various audiences.<sup>508</sup> Another important influence for consideration as was observed by a Canadian Immigration and Refugee Board (IRB) interviewee,<sup>509</sup> as well as Emmet Macfarlane, the political scientist,<sup>510</sup> is the adjudicator's perception of the proper execution of his role and function.

While Green and Alarie did not make any pronouncements on the concepts of independence or impartiality, they did declare their research findings demonstrated the 'attitudinal' model of judicial decision-making [the assumption that judicial decision-making is based in part on policy preferences] did not apply to Canadian Supreme Court judges to the extent it had in other jurisdictions. They did, however, take the position that their results demonstrate that any tampering with the current selection process for appointees to the Canadian Supreme Court should be re-considered in light of their findings.<sup>511</sup> However, it is also worthy of emphasizing these researchers noted throughout their analysis that the votes of one jurist caused great difficulty given she was such an extreme outlier<sup>512</sup> in that she demonstrated the highest level of support for decisions in favour of labour unions which was considered to be a 'liberal' attitude but had the lowest level of 'liberal' votes overall.<sup>513</sup> In some instances they had wondered whether or not her votes were so off the chart that they were influencing the results found using the Martin-Quinn method to the extent that they were unreliable.<sup>514</sup>

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<sup>508</sup> *Ibid.* at 41.

<sup>509</sup> François Crépeau & Delphine Nakache, "Critical Spaces in the Canadian Refugee Determination System: 1989 – 2002" (2008) 20 (1) *International Journal of Refugee Law* 50 at 100.

<sup>510</sup> Emmet Macfarlane, *supra* note 485.

<sup>511</sup> Green & Alarie, *supra* note 423 at 39.

<sup>512</sup> *Ibid.* at 25,30.

<sup>513</sup> *Ibid.* at 12, 30.

<sup>514</sup> *Ibid.* at 24.

### Canadian Immigration and Refugee Board Decision-making (2008)

It is also instructive to look at decision-making within the context of a large, national administrative tribunal where individual adjudicators are also routinely referred to as 'judges' and whose decisions also have life-changing impact. To this end Sean Rehaag has undertaken an empirical review of decisions made by the Canadian Immigration and Refugee Board (IRB) to determine the rate at which individual adjudicators granted claims for refugee status. As this information is not in the public domain, Rehaag used 'access to information' legislation to acquire details about decisions issued for the calendar year of 2006.<sup>515</sup> This request resulted in the creation of a database of 9,984 decisions on refugee claims which included not only administrative information but more importantly, the country of origin and gender of the claimant; and the name of the decision-maker.<sup>516</sup> It was immediately obvious that there was extreme divergence in the grant rates by individuals. For instance, Gilles Esthier and Martin Gisherman granted refugee status, respectively, in 95.65% and 94.55% of the 340 cases they heard in 2006 whereas Sajjad Randhawa and Suparna Ghosh conferred refugee status, respectively, in only 2.17% and 9.24% of the 165 cases they heard for the same time period.<sup>517</sup> As a result, the researcher attempted to determine the reason for these great disparities. After taking into account obvious reasons for why some adjudicators' grant rates would be much higher than others, (like removing cases that were likely to be successful as they had already been determined as being appropriate for expediting by staff as well as recognizing some geographic regions had much higher rates of success due to the social norms, prejudices and dangers inherent in the geographic region), it was still evident that there were dramatic differences among

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<sup>515</sup> Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 Ottawa Law Review at 340.

<sup>516</sup> *Ibid.* at 342.

<sup>517</sup> *Ibid.*

adjudicators. As a result of this phenomenon Rehaag determined it was reasonable to infer that the success rate could have been influenced by the identities of the decision-makers.<sup>518</sup> While Rehaag could not verify this speculation with the data he had assembled as he was not able to compare adjudication outcomes and rates to the personal characteristics of the adjudicators, he noted that a useful mechanism for determining if personal attitudes affected decision-making would be through IRB sanctioned structured interviews with Board Members. Rehaag provided some preliminary indications of the benefit this kind of research could supply by observing that François Crépeau, Delphine Nakache and Janet Cleveland had found through their interviews with former IRB Board members that "...there are many personal characteristics that significantly influence the decision-making process of refugee adjudicators".<sup>519</sup> The characteristics that Rehaag highlighted included social criteria like empathy and cultural sensitivity; cognitive criteria like lucidity and open mindedness, and from my perspective, surprisingly, he also included the criterion of 'common sense'.<sup>520</sup> Given the vast array of cultures, religions and family situations represented by refugee claimants compared with the idiosyncrasy of the adjudicators' various social locations it's difficult to imagine how adjudicators could come up with a means for determining what would be commonsensical to all concerned. In particularly dramatic terms, Devlin and Pothier have pointed out how reliance on the use of 'common sense' is seriously problematic as "Historical analyses make it clear that yesterday's common sense is, with hindsight, blatant racism".<sup>521</sup> Equally unexpected, from my perspective, is that the characteristics of gender and political affiliation were not raised as potential influences by the IRB interviewees. Perhaps this omission can be explained

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<sup>518</sup> *Ibid.* at 352.

<sup>519</sup> *Ibid.* at 354.

<sup>520</sup> *Ibid.*

<sup>521</sup> Devlin & Pothier, *supra* note 403 at 21.

by the fact that the interviewees were adjudicators themselves and they may believe they were not influenced by their genders or their political philosophies or ties, or, perhaps had not even considered the possibility of their influence.

François Crépeau and Delphine Nakache who have now published the results of their 2004 interviews with former IRB Board Members and other stakeholders in the process reported on a broad range of multi-faceted perceived and acknowledged influences on adjudicators' decisions. Unfortunately, this research could not be conducted in collaboration with the IRB, hence only former Board Members who volunteered to participate were interviewed. In order to arrive at their findings Crépeau and Nakache analyzed the results of interviews with 16 former Board Members from four geographic regions; and from focus groups with 53 knowledgeable informants involved with the IRB as either lawyers, non-governmental organization workers, health professionals, and interpreters. In addition, 30 refugee claimants (both successful and unsuccessful) from three distinct geographical regions were interviewed.<sup>522</sup> The researchers emphasized that given the inability to work in collaboration with the IRB to organize interviews, their interviewees were not randomly chosen and it would not be unreasonable to say the majority of former Board Members who were willing to be interviewed were likely more 'pro refugee' than others. However, Crépeau and Nakache support the legitimacy of their findings by concluding the Board Members who came forward were reliable and knowledgeable informants as they had, for the most part, long service records and some had additional responsibilities that provided for both a broad and deep view of the institution as a whole.<sup>523</sup>

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<sup>522</sup> Crépeau & Nakache, *supra* note 509 at 54.

<sup>523</sup> *Ibid.* at 55.



Factors which Crépeau and Nakache identified which comport with what has been identified by the judicial decision-making research is that political affiliation was apparent in the approach taken and decisions made by some adjudicators. For example, it was observed by an adjudicator that partisan politics “could...[be] demoralizing sometimes”.<sup>524</sup> In addition, some members reported that some of their colleagues had the impression that they were required to decide cases as directed by the government of the day.<sup>525</sup> Such comments do not speak to either an apolitical or non-partisan approach to adjudication.

Rehaag observes that as long as twenty years ago the Canadian Bar Association (CBA) had already complained about the extent of political influence in the appointments process.<sup>526</sup> Similarly, one of the adjudicators interviewed by Crépeau and Nakache noted that “...these jobs at \$100,000 a year are real plums and politicians are under considerable pressure from local supporters to consider them for the positions”.<sup>527</sup> Another adjudicator referred to ‘horse trading’ going on within the governing party to determine what type of appointment would be made and for how long.<sup>528</sup> News media coverage of a 2010 conviction of an IRB adjudicator for offering to grant a refugee claim in exchange for sexual favours also commented on the CBA’s critique of the pervasiveness of political patronage in the appointment process.<sup>529</sup> Adding weight to the CBA view, Crépeau and Nakache found that in 1997 the Auditor General had criticized the tools used by the government to select candidates noting they didn’t actually assess for qualification.<sup>530</sup>

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<sup>524</sup> *Ibid.* at 81.

<sup>525</sup> *Ibid.* at 80.

<sup>526</sup> Rehaag, *supra* note 515 at 356.

<sup>527</sup> Crépeau & Nakache, *supra* note 509 at 60.

<sup>528</sup> *Ibid.*

<sup>529</sup> Sarah Boesveld, “Immigration Judge found guilty in sex bribery case”, (21 April 2010) *The Globe and Mail*.

<sup>530</sup> Rehaag, *supra* note 515 at 356.

Presumably to address this concern, procedures were put in place by the federal government in 2004<sup>531</sup> so as to select candidates who are considered qualified to serve as adjudicators separate and apart from being politically connected.<sup>532</sup> More recently, in 2007, the Minister of Citizenship and Immigration Canada accepted the recommendations of the Public Appointments Commission's Secretariat and stated in a News Release that "changes to the selection process will strengthen the merit-based competency focus of GIC appointments to the IRB while increasing transparency and fairness".<sup>533</sup> These changes focussed on the creation of a new Selection Advisory Board whose members would include IRB senior staff as well as Ministerial appointees. Another 'innovation' (the quotation marks are my emphasis) that was highlighted was the inclusion of a mark of 'pass' or 'fail' for the test written by applicants. The underlying principle appears to be that being required to demonstrate a minimum standard of knowledge by passing a test will reinforce the importance of merit and improve the transparency of the selection process.<sup>534</sup>

Returning to the potential impact of personal characteristics, surprisingly, no commentary was provided on the impact of gender on approaches or outcomes to decision-making given Stribopoulos and Yahya's findings.<sup>535</sup> Interestingly enough, whether this was a function of personality, political affiliation, personal beliefs or a lack of understanding of the nature of their role, it was also opined that some adjudicators did not have the ability to approach their work with an open mind in that it was apparent that they had already made up their minds (either to accept or not) before the hearing had even

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<sup>531</sup> *Ibid.* and Cr  peau and Nakache, *supra* note 509 at 63.

<sup>532</sup> Cr  peau and Nakache, *supra* note 509 at 63 and Rehaag, *supra* note 515 at 358.

<sup>533</sup> Citizenship and Immigration Canada, News Release, "Minister Finley announces revised selection process for appointments to the IRB" (9 July 2007), online: CIC <<http://www.cic.gc.ca>>.

<sup>534</sup> *Ibid.*

<sup>535</sup> Stribopoulos & Yahya, *supra* note 421 at 356.

begun.<sup>536</sup> In addition, the high degree of influence of the adjudicator's perception of the proper execution of the role emerged from Crépeau and Nakache's research. For example, it was readily evident some adjudicators determined they should be giving the refugee applicant the benefit of the doubt when attempting to establish credibility rather than seeing "...their main role as detecting lies, focusing primarily on looking for inconsistencies and contradictions, often on minor details (such as dates) or secondary issues (for example, how the claimant got to Canada)".<sup>537</sup> It is abundantly clear from this kind of commentary and as noted by Rehaag how valuable it would be to verify these observations and speculations in comparison to grant rates over a longer term qualitative and quantitative empirical study.<sup>538</sup>

In the past, as pointed out by Rehaag, the IRB decision-making process was based on two adjudicators hearing claims together where the claimant only had to convince one of the adjudicators in order to have his claim granted.<sup>539</sup> As a result, one could realistically assume this kind of process would have resulted in the possibility of a greater spectrum of influences on the decisions made and the potential for the dampening or amplifying effect of different points of views, as observed by Sunstein et al and Stribopoulos and Yahya, to come into play. As the process in place now is for only one adjudicator to make a determination (with an internal appeal process only recently being made available) given the great difference in grant rates within geographic regions, it is readily apparent that the personal characteristics and affiliations, and perhaps the personal perspective on the proper role of the adjudicator, can loom large with respect to refugee claimants' fates.

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<sup>536</sup> Crépeau & Nakache, *supra* note 509 at 79.

<sup>537</sup> *Ibid.* at 100.

<sup>538</sup> Rehaag, *supra* note 515 at 355.

<sup>539</sup> *Ibid.* at 359.

Lawrence Baum introduces another motivation for judges (and I would posit, by extension, other types of decision-makers) arriving at particular decisions which relates to the concepts of both independence and impartiality. He notes judges are not like Dr. Spock with no emotions nor any desire to please others.<sup>540</sup> Therefore, he thinks it's reasonable to conclude judges' decisions may not only be influenced by party of appointment or other variables, but they may also be influenced by how they as individuals will be perceived and/or whether their decisions will be accepted by various audiences. As a result, in his estimation, except for the strongest ideologues and asocial individuals, judges care about self-presentation and various groups' responses to their judgments and their contributions to policy development. Baum believes that "...judges' motivation to win the approval of their audiences can explain a good deal about their choices as decision-makers..."<sup>541</sup> For example, he has determined the views of judges' social groups and the legal community are important to the majority of judges; that policy groups are important to others, while the news media may also have relevance as a force on its own and as an intermediary between judges and other audiences.<sup>542</sup>

An example of the relevance of Baum's theory to the Canadian judiciary can be found in the comments made by the Right Honourable former Chief Justice Lamer (Chief Justice Lamer) when he indicated his support for striking down the law that made accessible abortion illegal in Canada, post *Charter*, was profoundly influenced by his belief that public opinion was not on the side of criminalizing abortion. Specifically, the then Chief Justice stated: "My reasoning is that unless you have a vast majority of people think

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<sup>540</sup> Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton and Oxford: Princeton University Press, 2006) at 174.

<sup>541</sup> *Ibid.* at 23.

<sup>542</sup> *Ibid.* at 163.

something is criminal, you should not make it a crime".<sup>543</sup> This comment unequivocally demonstrates the power of majority public opinion on a particular Chief Justice's approach to the adjudication process. In addition, one can also imagine that another judge deciding the same issue may want to impress a different audience, perhaps, a minority public opinion, depending on what and who is important to her. Not surprisingly, these different audiences would be impressed by different decisions. For example, in Jeffrey Toobin's analysis of the behaviours and voting records of nine U.S. Supreme Court judges, *The Nine Inside the Secret World of the Supreme Court*, he observes one judge cared a great deal about what *The New York Times* journalists thought by saying "...Kennedy always labored most closely on the sections of the opinions that might be quoted in *The New York Times* ".<sup>544</sup>

Stribopoulos and Yahya also comment on David S. Law's study that looked at appeal court judgments delivered by the Ninth Circuit in the U.S. and found a similar proclivity. Specifically, for some judges, it was apparent that if the decision was to be published they would put out a dissenting opinion when the decision was not consistent with their ideological orientation. Whereas, if the judgment would not be published and their vote would not be in the public domain then they would be willing to support decisions that ran counter to their 'known' ideological orientation.<sup>545</sup>

### Third Analysis of Canadian Supreme Court Decisions (2008)

Donald R. Songer, an American political science scholar, has focused considerable energy on the functioning of the Canadian Supreme Court (SCC). Specifically, he has attempted to determine whether the SCC's determinations can be categorized using the

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<sup>543</sup> *Catholic Insight* "Antonio Lamer 'liberated' Canada for abortion" (2008) online: <<http://catholicinsight.com>>.

<sup>544</sup> Toobin, *supra* note 439 at 62. See Stribopoulos and Yahya, *supra* note 421 at 323.

<sup>545</sup> Stribopoulos & Yahya, *supra* note 421 at 323.

legal, attitudinal or strategic model of decision-making.<sup>546</sup> Songer conducted in-depth interviews of 60 to 90 minutes in duration with ten current and recently retired Supreme Court justices and four former law clerks, all of whose comments are not identified by name. These interviews were conducted over a six-year period from 2001 to 2007. He also analyzed a database of all SCC decisions from over a roughly 30-year period. In looking at the cases he was especially interested in criminal law, *Charter* rights and liberties and economic disputes.

Songer's first observation that is particularly relevant to this discussion is the SCC (the Court) has changed dramatically as a result of the introduction of the *Charter* as it now has to deal with many issues that have impact far beyond the individual case being heard. In addition, when choosing what appeals it will hear, the Court has shown it is particularly interested in deciding cases that have national importance, where federal law is involved and particularly where provincial and territorial appellate courts have come to different conclusions.<sup>547</sup> Hence the Court has clearly established itself as a policy-making body especially in relation to rights adjudication and other constitutional issues. This observation is very important as it presents another challenge to impartiality and independence in that judges are not simply reacting to the cases brought to their attention. At this level they have the freedom to choose the cases they will (or want to) hear. This responsibility to choose what cases will be heard provides for more opportunities for political affiliations; policy preferences; gender affiliations or antagonisms and personal attachments that jurists may either be fully aware of or not aware of at all to influence their choices as to which issues deserve to be heard.

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<sup>546</sup> Songer, *supra* note 419 at 5.

<sup>547</sup> *Ibid.* at 23.

Songer found that even with such politically contentious matters to decide, the court still maintained a high degree of collegiality.<sup>548</sup> This finding is very interesting from a theoretical point of view as it leads to the question of whether the desire to be collegial reduces the willingness of jurists to maintain what may be unpopular but correct analyses based on 'black letter' law, precedent and social context. Or, does the influence of collegiality provide for unanimous decisions that are very narrowly focused so all members can sign on to them? Alternatively, does the presence of the views of other people who the decision-makers respect, a.k.a. a collegial approach, assist them to re-think or re-evaluate what might be an automatic or knee jerk reaction based on a political preference. If so, the impact of collegiality may be very positive in that it fosters deliberation and better decision-making. However, we have evidence to demonstrate the opposite can also occur.

Roger Brown, the noted social psychologist, ominously warns "There is nothing new to be learned in group discussion".<sup>549</sup> He observes that based on Burnstein's findings<sup>550</sup> social issues related to capital punishment, race and gender engender polarizing discussions whereas discussions on topics unfamiliar to the participants resulted in depolarization. This is the phenomenon that was also observed in Sunstein et al's study described in detail earlier. For example, in cases involving gay rights where three Democrats were on the Panel they voted 100% in favour of gay rights; whereas Panels of three Republicans voted in favour of gay rights in 14% of the cases. By comparison when judges were not sitting in homogenous political Panels, Republicans voted for gay rights in 16% of the cases and Democrats in only 57% of the cases. Similar levels of convergence

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<sup>548</sup> *Ibid.* at 242.

<sup>549</sup> Roger Brown, *Social Psychology The Second Edition*, (New York: The Free Press, Macmillan Inc., 1986) at 226.

<sup>550</sup> E. Burnstein produced "Persuasion as Argument Processing" in *Group Decision-making*, (London: Academic Press, 1982); and with A. Vinokur "Testing two classes of theories about group induced shifts in individual choice" in the *Journal of Experimental Psychology* (1973) and "What a person thinks upon learning he has chosen differently from others: Nice evidence for the persuasive arguments explanation of choice shifts" in *The Journal of Experimental Psychology* (1975).

of opinion or polarization (Republican to Democrat) was observed with the *National Environmental Policy Act* (24% to 51%), in affirmative action cases (28% to 49%), in sex discrimination cases (17% to 46%), in the *Americans with Disabilities Act* (16% to 33%) and finally for campaign finances (14% to 31%).<sup>551</sup> Sunstein draws the obvious conclusion from this data set and his experience that deliberation among like-minded individuals with strongly held points of view results in a greater tendency toward convergence on the jointly held perspective. These data demonstrate that if a particular jurisdiction is interested in ensuring divergent points of view are taken into account when any entity is making process and/or substantive decisions, (whether it be a bench of appeal court judges or a Panel for an administrative tribunal or a group of facilitators), it will be necessary to provide for a diverse group of decision-makers.

An experiment instructive in this regard is the Public Conversations Project (PCP) developed by a group of family therapists in 1989 in Watertown, Massachusetts to address intractable disputes. In one experiment, six women were brought together, three who were identified as 'pro-life' leaders and three who were identified as 'pro-choice' leaders to discuss abortion. They did so due to the killing of two women and the shooting of others, in Brookline, Massachusetts on December 30, 1994.

The six participants met privately over a five and a half year period for approximately 150 hours. The January 28, 2001 article co-written by all six participants and published in *The Boston Globe* states:

Our talks would not aim for common ground or compromise. Instead the goals of our conversations would be to communicate openly with our opponents away from the polarizing spotlight of media coverage; to build relationships of mutual respect

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<sup>551</sup> Cass R. Sunstein, *Why Groups Go to Extremes*, (Washington, DC: The American Enterprise Institute for Public Policy Research, 2008) at 6.



and understanding; to help deescalate the rhetoric of the abortion controversy; and ... to reduce the risk of future shootings.<sup>552</sup>

The outcome of this experiment was the participants' mutual caring and understanding deepened while at the same time they all became firmer in their original views about abortion. While there were beneficial outcomes to their discussion, (e.g. they stopped using demonizing language about one another's beliefs in public settings and they worked together to prevent further assaults in the Boston area), they did not achieve compromise nor were they expected to do so. Laura Chasin, the former Director of the PCP, is adamant that only dialogue can reduce polarization of opinion and/or demonization of those who disagree with us. She notes in her treatise on how to promote constructive discussion that:

Taking the first step toward a more accurate understanding of our political opponents, becomes easier when we grasp that it is not the **substance** of our differences – neither their content nor their intensity – that polarizes us, but the way in which we **express** our passionate perspectives.<sup>553</sup>

Ms. Chasin holds the view that we are able to make this distinction between style and substance when we are highly motivated and not feeling threatened.<sup>554</sup> Interestingly enough, she sees 'compromise' as anathema to true dialogue. In fact, Chasin sees compromise as mutating "...black and white views to an unacceptable shade of gray..."<sup>555</sup> and that by engaging in dialogue we are able to bring colour into the conversation which in

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<sup>552</sup> Fowler, A., Nichols Gamble, N., Hogan, F.X., Kogut, M., McComish, M. and Thorp, B., "Talking with the Enemy" *The Boston Globe* (January 28, 2001) at 2.

<sup>553</sup> Laura Chasin, "How to break the argument habit" *The Christian Science Monitor* (26 October 2004) at 2 online: *The Christian Science Monitor* <<http://www.csmonitor.com/2004/1026/p08s01-coop.html>>. Please note that the bolding of the terms are 'substance' and 'express' is my emphasis.

<sup>554</sup> *Ibid.* at 3.

<sup>555</sup> *Ibid.* at 2.

her view "...increases mutual understanding, builds respectful relationships, and stimulates fresh ideas about complex issues".<sup>556</sup>

The reality of judicial decision-making is that rigorous analysis of litigants' competing needs and rights on matters of immense magnitude has to be completed in a reasonable time frame. As a result, Sunstein's conclusion that "...an understanding of group polarization helps show that heterogeneous groups are often a far better source of good judgments, simply because more arguments will be made available"<sup>557</sup> is instructive on how to best proceed. This understanding is crucial to the discussion of impartiality and independence as it is impossible to say there is one right answer, or an objective truth, in law, or in many other social disciplines, in a diverse society. Therefore, it is readily evident that a wide variety of points of view represented by a diverse group of decision-makers is necessary in order to arrive at a carefully considered and fair outcome.

A second theme also identified by Songer is that while the court decides cases on legal grounds there is also strong evidence to demonstrate judges decide cases not on the basis of precedent and 'black letter' law but also on their political preferences.<sup>558</sup> In addition, there was also substantial gender difference in the voting patterns of justices. This shouldn't be a surprise given Stribopoulos and Yahya's findings cited earlier. However, while the voting patterns demonstrated that political affiliation and gender were influential, this observation was countered by the fact Songer found that the justices also took particular actions which suggest they were not driven solely by political preference and perspectives informed by gender. For example, he learned from his interviews with the ten justices that each justice spent a great deal of time preparing for oral argument by

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<sup>556</sup> *Ibid.* at 3

<sup>557</sup> Cass R. Sunstein, *supra* note 551 at 24.

<sup>558</sup> Songer, *supra* note 419 at 245, 246.

reviewing the factums in an effort to master the legal arguments made; clerks were asked to do additional research on the primary issues being argued and to analyze precedents the justices weren't familiar with; each justice always discussed legal issues with their clerks prior to oral argument but only occasionally the policy issues; none of the judges said they asked the clerk to find ways to justify a decision on the basis of the judge having already made up his or her mind on the basis of the factum; and, judges said they frequently switched sides after hearing oral argument.<sup>559</sup> While it appears Songer is praising these decision-makers for these behaviours, it would seem such activities would be *pro forma* when operating in an independent and impartial manner. Also, even though it is somewhat uncomfortable to do so, the question must be raised as to whether or not the interviewees were conscious their comments would be published and their answers, while sincere, were constructed to ensure their decision-making was not seen to be, in the main, 'partial'. However, these actions themselves suggest to Songer that political preferences and gender sensitivities do not reign supreme and the law itself and precedent is influential to what he describes "...to at least some non-trivial degree".<sup>560</sup> In addition, it is also important to emphasize that all of the judges acknowledged that their personal predispositions and affiliations did indeed affect their votes and opinions at least some of the time and they did admit to bargaining with their colleagues on occasion.<sup>561</sup> Unfortunately, Songer did not pursue or does not state what influences or variables were in play when the justices were *not* affected by their personal views or how and when the judges justified their personal points of view being influential when deciding particular cases.

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<sup>559</sup> *Ibid.* at 245.

<sup>560</sup> *Ibid.* at 246.

<sup>561</sup> *Ibid.* at 236.

Another important conclusion Songer arrived at was the desire to deliver unanimous decisions and maintain collegial relationships was such that it appears the influence of judges' personal political preferences were dampened with the outcome being that of a moderate compromise position rather than a straightforward acceptance or rejection of the arguments presented.<sup>562</sup> In order to achieve unanimity it was observed by one of the justices that "...fudgier..."<sup>563</sup> or more narrow judgments than originally drafted were ultimately written so as to provide room for everyone to sign on. This desire for unanimity conflicts with one of the Court's earlier stated goals which was to decide issues of national importance so as to ensure provinces and territories were not taking different paths on interpretation. Presumably, 'fudgier' judgments reduce the clarity the justices indicated they were seeking to provide. However, it must also be acknowledged that multiple opinions and dissents can also reduce clarity. Nonetheless, a unanimous compromise opinion that provides little direction on substantive issues does not seem to support the Court's stated intention for establishing a standard interpretation for lower courts to rely on.

The third theme identified by Songer relevant to the notion of impartiality is the SCC is moderate from a political perspective. This outcome is demonstrated to Songer by the fact he did not discern dramatically high or low levels of support for either liberal or conservative policy positions or for business vs. government or individuals, etc.<sup>564</sup> Ian Greene provides additional commentary on whether the right or left side of the political spectrum has gained supremacy in the courts by observing that left leaning academics opine that the courts have allowed the rich to become richer and for the disadvantaged to

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<sup>562</sup> *Ibid.* at 249

<sup>563</sup> *Ibid.*

<sup>564</sup> *Ibid.* at 247.

be further disenfranchised. In contrast, Professor Greene notes that right leaning academics believed *Charter* challenges have been dominated by leftist special interests.<sup>565</sup> Ultimately Greene provides support for Songer's observation of the existence of an overall moderate approach in that he concludes that the criticisms from both academics from the left and the right may be indicative of the judiciary "...doing a good job of steering a middle course."<sup>566</sup>

Songer makes the final point that the SCC is a more democratic institution than other comparable courts as ordinary people have substantial access to the Court who are not connected to business or organized interest groups, and they win more often than they do in other comparable courts around the world.<sup>567</sup> He is also impressed with the diversity of religions being represented on the Court at the time of his study. However, his view of diversity is the presence of judges affiliated with two different Christian religions, specifically Protestant and Roman Catholics, being represented "...on a fairly equal basis..."<sup>568</sup> which many would agree is a very narrow definition of religious diversity.<sup>569</sup> The importance of having diverse religious view points represented was provided in the analysis undertaken by Adam Liptak, described earlier, which demonstrated that a U.S. Supreme Court majority which favoured one religious faith's position dismissed precedent in order to support the litigant who was championing their particular religious view.<sup>570</sup>

Songer is also impressed by the fact that Canadian Supreme Court judges come from many different law schools and undergraduate universities in sharp contrast to the U.S. and the U.K. experience where the highest court judges come from a very small

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<sup>565</sup> Ian Greene, *The Courts* (Vancouver: UBC Press, 2006) at 109.

<sup>566</sup> *Ibid.* 110.

<sup>567</sup> Songer, *supra* note 419 at 248.

<sup>568</sup> *Ibid.* at 251.

<sup>569</sup> Since the release of Songer's study two judges who are Jewish have been appointed to the SCC.

<sup>570</sup> Liptak, *supra* note 436 at 3.

number of elite institutions. Clearly having justices in place representing a broader diversity of economic and social circumstances should not only be considered praiseworthy but essential given the high degree of influence personal characteristics can have on judicial outcomes. The Honourable Madam Justice Maryka Omatsu in her account of her own appointment to the bench as an 'outsider', that is as a Japanese Canadian woman, in "The Fiction of Judicial Impartiality" speaks directly to the importance of social and economic diversity of appointees to the bench at all levels. Specifically, she has concluded that judges who are economically privileged do not deliberately make judgments that are advantageous to those of their particular social and economic class and those of their ancestors; rather, it is their lack of experience in milieux different from their own that can create a "...systemic blindspot".<sup>571</sup> Justice Omatsu notes that, as a direct result, this lack of experience can have a profound effect on their determinations of fact and motive. Her commentary is important as it is counter-intuitive to suggest a group of people who have no experience with poverty or homelessness with insufficient resources to care for their children, or their own basic needs would be able to effortlessly understand the actions or motivations of accused persons who know nothing else.

Songer also notes that in 2008 Canada had more women sitting as Supreme Court jurists than U.S., Britain, and Australia combined.<sup>572</sup> While this is a notable accomplishment and bodes well for the future, the inclusion of multiple perspectives of different women does not ensure judicial decision-making will be 'fair' in relation to women as noted by Justice Omatsu in her endorsement of Isabel Grant and Lynn Smith's view<sup>573</sup> that the system within which these women do their work was built with very little input from

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<sup>571</sup> Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 Canadian Journal of Women and Law, at 7.

<sup>572</sup> Songer, *supra* note 419 at 252.

<sup>573</sup> Omatsu, *supra* note 571 at 5.

women. In addition, there is no good reason to believe that all women who are appointed as judges would necessarily be better informed or more capable than men who have been traditionally appointed to these roles in making appropriate use of social context with respect to race, ethnicity and socio economic class.

However, in contrast to Justice Omatsu (1997), Razack (1998), Devlin (1995) and many others, Songer does not address one important aspect of diversity; that is, race and ethnicity. He does not comment on the fact the SCC has gone from "...a pale, male bench..."<sup>574</sup> as the Right Honourable Chief Justice Richard Goldstone from South Africa described the courts of yester years in his country, to now being a 'pale, male and female' bench. Justice Omatsu makes particular note of the fact that the judiciary is "...overwhelmingly white, male and upper-middle class."<sup>575</sup> The absence of race in Songer's analysis is striking as the issue of race is a major theme in public discourse as it relates to access to and the dissemination of justice in many jurisdictions.<sup>576</sup> Presumably, the same observation noted above about women not being involved in the construction of the legal system in the past, would also apply to those who are racialized, those who are not well educated or economically successful, etc. who traditionally have not been influential in the design or implementation of the justice system. For example, Toni Williams has looked at the disparities in the sentences imposed on black and white men within the criminal justice system in Ontario in an attempt to determine the rationale for differing outcomes. Her view is that the requirement for judges to assess the vague and

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<sup>574</sup> Richard Goldstone, Panel Discussion at "Looking Back, Looking Forward: Judicial Independence in Canada and the World" University of Toronto, (29 November 2007) [unpublished] and The Kennedy Library Forums, The Struggle for Freedom and Justice in South Africa (undated) at 9.

<sup>575</sup> Omatsu, *supra* note 571 at 8.

<sup>576</sup> Examples include: Patricia Hughes & Mary Jane Mossman "Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives" Department of Justice Canada (2004-01-13); <http://www.justice.gc.ca/eng>; Richard J. Lundman & Robert L. Kaufman "Driving While Black" Effects of Race, Ethnicity and Gender on Citizen Self-Reports of Traffic Stops and Police Actions" (2003) 41 Criminology 195.

undefined notions of an offenders' attitude or personality when imposing a sentence lends support to the theory that unconscious discrimination on the basis of race can influence outcomes.<sup>577</sup>

Songer also comments on what he considers to be the diversity of ethnic, linguistic and geographical representation as the SCC is made up of Anglophones from Ontario (by convention) Francophones (by law from Quebec) and western and eastern regional representation (by convention).<sup>578</sup> Notably, no reference is made to the fact that while great emphasis is placed on Anglophone and Francophone cultures being equally represented on the SCC the other founding nation of Canada, that being native or aboriginal peoples, has never been represented at the SCC level nor have people of colour ever been represented on this top court either.<sup>579</sup>

Given the SCC Bench is comprised of nine people and their appointments are of a high profile nature it is not difficult to identify ethnicity and race. However, the demographic diversity of the much larger pool of federal judicial appointees is much more difficult to examine. While the number of men and women who are appointed is easily found, in contrast when Sonia Lawrence attempted to acquire statistics on other demographic criteria like race/ethnicity, disability or aboriginal status as it relates to the pool of applicants for federal appointments circa 2010 she was advised no such information was available.<sup>580</sup> Early in 2000, Ian Greene pointed out through information gleaned from the Manitoba Aboriginal Justice Implementation Commission that as of 2001 eighteen Aboriginal judges had been appointed which represented .8% of the judiciary overall.

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<sup>577</sup> Toni Williams, "Sentencing Black Offenders in the Criminal Justice System", in David Cole & Julian Roberts, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) at 214.

<sup>578</sup> Songer, *supra* note 419 at 21.

<sup>579</sup> Sonia Lawrence, *supra* note 414 at 202. In Lawrence's reflections on impartiality and independence she draws attention to the many scholars and organizations calling for the appointment of an aboriginal judge to the SCC.

<sup>580</sup> *Ibid.* at 214:



While this may be considered an achievement in some circles the salary data also demonstrated that the aboriginal judges earned on average 42% less than the judicial average. This information demonstrates that the appointments were made to lower courts hence the previously identified salary gap.<sup>581</sup>

It is noteworthy that before *R. D. S.* was appealed to the Supreme Court, The Honourable Mr. Justice Freeman of the Nova Scotia Appeal Court stated in his reasons for dissenting with the majority opinion that "Judge Sparks [a black woman] was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding".<sup>582</sup> While his use of the term 'common sense' is troubling given it is not a meaningful term in a multi-cultural/racial/pluralist society, Justice Freeman also points out emphatically that while cases which involve race are more difficult to decide due to the potential for volatility, the judge is still required to address the questions that arise "...freely and frankly and to the best of the judge's ability".<sup>583</sup> When the appeal to the SCC was successful it was noted by a local journalist that this was an extremely important decision as it conveyed "...a sense that for the first time ever Black experiences and perceptions have received some legitimacy with the court system".<sup>584</sup> This decision that addressed race when the evidence was being examined "...has clearly acknowledged that colour blindness is not necessarily synonymous with impartiality".<sup>585</sup> However, it is extremely ironic given the systemic bias and racism experienced by people of colour in many different arenas, that the first judicial decision to be examined for racial bias by the SCC was issued by a judge

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<sup>581</sup> Greene, *supra* note 565 at 62.

<sup>582</sup> Devlin & Pothier, *supra* note 403 at 6.

<sup>583</sup> *Ibid.* at 7.

<sup>584</sup> *Ibid.* at 9.

<sup>585</sup> *Ibid.* at 37.

who was the the first black woman appointed to the bench in Canada and the first racialized person from Nova Scotia to fulfill this function.<sup>586</sup> Sherene Razack observed "...how quickly and efficiently the elites swung into action to call Judge Sparks to account, a showing of white group consensus?"<sup>587</sup> in her analysis of how dangerous it can be for racialized people occupying public positions to challenge the traditional view of officialdom.<sup>588</sup> It is important to highlight for the purposes of this examination that the majority opinion concluded that rather than being racist, her decision was unbiased and "...alert to a pervasive social reality".<sup>589</sup> This wording demonstrates with great clarity the importance of decision-makers being knowledgeable about a wide variety of social contexts, either through experience, study or effective listening in order for sensible decisions to be rendered.

Martha Minow has made the point that when two African American judges, one man and one woman, refused to recuse themselves because it was believed they could not be impartial when it came to cases of race discrimination, it exposed the following belief:

...the assumption that the neutral baseline against which to evaluate bias is the vantage point of a white male. They mean to show that even whites and males have a vantage point that can and should be evaluated for bias. Departure from a white male perspective does not necessarily mean bias. ...<sup>590</sup>

These observations are very important to any analysis of decision-making as we must recognize what a mistake it would be to assume those whose race and gender are most dominant in terms of decision-making do not have personal prejudices or through some

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<sup>586</sup> The Canadian Bar Association, News Release "Judge Corne Sparks wins CBA 2008 CBA Touchstone Award" (15 August 2008), online: <CBA <<http://www.cba.org>>.

<sup>587</sup> Sherene Razack, "*R.D.S. v. HER MAJESTY THE QUEEN: A CASE ABOUT HOME*" (1998) 9:3 FORUM CONSTITUTIONNEL 59 at 65.

<sup>588</sup> *Ibid.* at 60.

<sup>589</sup> Devlin & Pothier, *supra* note 403 at 11.

<sup>590</sup> Minow, *supra* note 375 at 1207.

magical mental gymnastic feat acquired a 'view from nowhere'.<sup>591</sup> Devlin and Pothier also pointed out the irony that the research in both Canada and the U.S. shows that there is an increased likelihood that the decisions of judges who are racialized and/or women will be challenged for an apprehension of bias. One of their prescriptions for addressing this reality is to emphasize the need for appellate court judges to be mindful of the potential for this disturbing trend to be at play in the cases brought to their attention.<sup>592</sup>

Would it be reasonable to conclude from the foregoing information that ADR practitioners and decision-makers who claim to be impartial and independent, are therefore more like the majority of Canadian Supreme court judges whose decisions were assessed by Green and Alarie than like U.S. federal court judges or Ontario appeal court judges or the judges interviewed by Songer? As noted earlier, the 'attitudinal' model assumes the policy orientation of the judge is reflected in her judgments. As the majority of the empirical research on judicial decision-making generally supports this assumption<sup>593</sup> it is reasonable to explore whether this model would apply to other decision-makers and ADR practitioners' decision-making as well. However, using the established empirical method of assessing decisions made against some of the personal characteristics of the decision-maker or practitioner would be impossible given the vast majority of ADR practitioners' decisions to take particular actions or make various suggestions are not even written down and those that are, are rarely publicized. It must also be recognized that while some of the conclusions and recommendations put forward by some Ombuds are widely disseminated, the vast majority of the work is undertaken by all Ombuds is done in private and not discussed in the public domain.

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<sup>591</sup> Nagel, *supra* note 473.

<sup>592</sup> Devlin & Pothier, *supra* note 403 at 27.

<sup>593</sup> *Ibid.* at 10.

### Impartiality within ADR

Wendell Jones, a former Ombudsman, and Scott Hughes, law professor, state with regard to Ombuds' roles in relation to impartiality:

Even to say that impartiality and objectivity is a standard to which we **should** each aspire is to invoke a method of thinking and a view of reality that does not exist. There is no there there when it comes to this assertion. To use this thinking is to assume that which is not. To believe that we should seek impartiality and objectivity is to assume that such concepts exist outside of each of us, and that we can seek to examine understand, and emulate these concepts. It just ain't so.<sup>594</sup>

Similarly, Susan Sturm, (Professor of Law and Social Responsibility at Columbia Law School) and Howard Gadlin (Director and Ombudsman for Center for Cooperative Resolution/Office of the Ombudsman, the National Institutes of Health), in their analysis of how to effect systemic change using informal conflict resolution approaches, (e.g. ADR), also query the notion that 'detached neutrality' is the best way or the only way to overcome bias.<sup>595</sup> As a result, their assessment of the non-adjudicative (e.g. facilitation, mediation, ombudsing) ways and means that have been effective in creating systemic and system-wide change in a large and complex institution have determined the alternative notion of 'multi-partiality' is an important means for checking bias. They posit that in the use of the multi-partiality method "Bias is acknowledged as inevitable and as something that must be surfaced and corrected".<sup>596</sup> Their observation is the use of 'reflective practice' in an interdisciplinary context, de-stabilizes bias in that reflective inquiry requires the ADR practitioners themselves to explain, to one another, on a regular basis, what they are doing and why. In addition, the analysis of root causes ensures those directly affected are

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<sup>594</sup> Wendell Jones & Scott Hughes. "Complexity, Conflict Resolution and How the Mind Works", (2003) 20 Conflict Resolution Quarterly at 492. The emphasis on 'should' by use of bold text is mine.

<sup>595</sup> Susan Sturm and Howard Gadlin: "Conflict Resolution and Systemic Change" Journal of Dispute Resolution, 1, (2007) at 4.

<sup>596</sup> *Ibid.* at 60.

consulted and while doing so, the ADR practitioners recognize they must be very careful how they perform that consultation as they are being observed. Finally, the intermediary or ADR practitioner is accountable to many different stakeholders or constituencies who typically participate only on a voluntary basis. In this modality the practice of multi-partiality is defined as “Critically analyzing a conflict from multiple vantage points – as a way to check the inevitable biases in decision-making that must be continually surfaced and corrected”.<sup>597</sup> Chris Moore, the prolific author on the subject of mediation has also applauded the introduction of the term and concept of ‘multi-partiality’ by describing it for mediators as “We’re not removed, we’re partial toward all parties trying to get their interests met”.<sup>598</sup> He notes, however, that mediators, when demonstrating multi-partiality, must also accept the principles of reasonableness and fairness. Kenneth Cloke introduced the term of ‘omnipartial’, which he defines as being simultaneously on the side of each party,<sup>599</sup> to the dispute resolution lexicon as a means to describe what he thought parties involved in mediation expected from the mediator. He also contends that no one can be neutral in relation to conflict as our own experiences in this arena influence our perceptions of others’ in similar experiences. In addition, Cloke argues that no one in court or work place environments can be neutral either as he does not believe it is possible to erase biases and points of view. It is noteworthy that he observes that judges in particular have what he calls ‘intractable bias’ and that is “... the bias of believing they are without bias”.<sup>600</sup>

In a similar vein, Bagshaw, who describes himself as a post-modernist thinker, also defies the notion of neutrality, but in opposition to Jones and Hughes’ 2003 analysis, he

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<sup>597</sup> *Ibid.* at 4.

<sup>598</sup> Chris Moore, Video of Interview from Eye of the Storm (2006) ISBN #1-933857-04-8 online: <<http://www.mediate.com>>.

<sup>599</sup> Kenneth Cloke, *Mediating Dangerously*, (San Francisco: Jossey-Bass Publishers, 2001) at 13.

<sup>600</sup> *Ibid.*

replaces neutrality with 'self-reflexivity'. He suggests a 'post-modern mediator' should attempt to:

Avoid defining oneself and one's role as 'neutral' and emphasize the importance of self-reflexivity<sup>601</sup> in the mediator (requires control of one's professional, personal, and cultural biases in order to understand the standpoint of the other), while valuing the creative use of self.<sup>602</sup>

Mulcahy uses similar language in her explanation of what she terms broadly 'reflexive practice'<sup>603</sup> which she observed through her examination of a British community mediation program. The approach taken was known as 'Advanced Mediation' in this instance. This modality came about through co-mediators initiating debriefing discussions subsequent to mediations where they assessed how their personal critiques of the issues in dispute and the behaviour of the disputants themselves had affected the way they conducted the mediation and what options for resolution they brought forward. Through this debriefing process they made a concerted effort to illuminate their biases and to understand how they affected their performance as mediators.<sup>604</sup> In addition, Mulcahy also observed mediators behaving in ways during mediations that verified "...responsible partiality..."<sup>605</sup> in that when it was appropriate to do so, they served as champions for the causes of the parties (the neighbours in dispute) by taking the side of the residents against the powerful Housing Authority. It is evident from the examples cited, (e.g. inadequate insulation, the density of the population, badly done conversions and lack of safe outdoor play spaces),<sup>606</sup> that the mediators determined this type of partiality was ethical in the

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<sup>601</sup> The concept of self reflexivity as originally coined by Foucault in relation to the importance of self and the lack of objectivity found in the discipline of social sciences is now well established in all manner of activity where individuals engage in reflective practice in an effort to assess whether or not they are being influenced by 'good or bad bias'.

<sup>602</sup> D. Bagshaw, "The Three M's – Mediation, Postmodernism, and the New Millenium" (2001) Vol. 18 No. 3 Mediation Quarterly at 218.

<sup>603</sup> Mulcahy, *supra* note 356 at page 516.

<sup>604</sup> *Ibid.* at 517.

<sup>605</sup> *Ibid.* at 516.

<sup>606</sup> *Ibid.* at 518.

circumstances as the Housing Authority itself was responsible for the dysfunctional system which was creating the disputes being mediated.

Hilary Astor, the Australian ADR scholar and mediator, categorically rejects the possibility of neutrality in mediation but taking a different tack, puts forward the notion that instead of mediators chasing neutrality, mediators should be emphasizing respect for the core value of consensuality. Her thesis is mediators always have an obligation to deal with power in relation to the parties, for instance, who is more privileged and how that privilege operates within the mediation and what has to be done from a procedural point of view in order to deal fairly with those power dynamics. Consequently, she theorizes that the recognition of a power dynamic should also be a constant in ADR practice and that the mediator must always be thinking about his or her own power in the process as well. As a result, mediators must constantly deal with the impact of varying degrees of power within mediations and intervene in many different ways to ensure the process is fair. Given this responsibility, they can never be neutral. Therefore, she believes the mediator's role should be more accurately defined as seeking the highest level of participation among the parties and assisting the parties themselves to maximize their control. In an effort to more clearly articulate what it is that mediators actually do when they are assisting parties to resolve their disputes Astor states:

Maximizing party control is, for many mediators, a description of what they already do. However, a major change is that maximizing party control gives mediators more definable tasks. Instead of pursuing an undefined and unattainable goal of neutrality they seek to understand and acknowledge their own input into mediation; think carefully (about) what is appropriate input for the mediator and how they can ethically minimize their input and maximize the control of the parties.<sup>607</sup>

At a much earlier juncture, Rifken, Millen and Cobb (1991) also rejected the possibility of neutrality and encouraged mediators to discard the task of message

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<sup>607</sup> Hilary Astor, "Mediator Neutrality: Making Sense of Theory and Practice" (2007) 16 Social Legal Studies at 235.

transmitter from party to party in favour of constructing the role in such a fashion that it allowed them to "...facilitate the production of a coherent narrative".<sup>608</sup> Their view is by using this approach mediators can help parties to develop acceptable agreements, through "...the ongoing interactive nature of the mediation narrative".<sup>609</sup> They see this method as being superior to mediators espousing a commitment to neutrality via the use of 'equidistance' (i.e. temporarily and equally aligning themselves with each party in order to get the issues out) as this intentional alignment designed to increase the potential for moving forward in a constructive manner actually resulted in mediators contributing to parties developing their sides or positions.<sup>610</sup>

These points of view are particularly instructive as they challenge the beliefs typically informing all manner of training programs and ADR literature that operate on the premise that mediators, Ombuds, arbitrators, facilitators are by definition, neutral and/or impartial without any discussion of the meaning of these terms and without acknowledging the difficulty associated with the attainment of these characteristics.

#### Achieving Impartiality

In contrast there are other individuals who have considered that impartiality is indeed achievable. Justice Huddart's prescriptions in her reflectively titled article "Know Thyself: Some Thoughts About Impartiality of Individual Decision-makers From an Interested Observer" takes a 'self-regulation' trajectory and her belief is that being impartial means being loyal to the decision-maker's mandate rather than to the decision-maker's own conscience which is generally understood to be the moral values endorsed or

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<sup>608</sup> J. Rifken J. Millen & S. Cobb, *supra* note 394 at 161.

<sup>609</sup> *Ibid.* at 160

<sup>610</sup> *Ibid.*



subscribed to by the individual.<sup>611</sup> Chief Justice McLachlin makes the same assertion when providing her views on how a judge must interpret constitutional principles in that she makes a clear distinction between 'personal conscience' and 'judicial conscience'. McLachlin posits that it is a judge's duty to abide only by 'judicial conscience' which is predicated on the "...judge's sworn commitment to uphold the rule of law. It [judicial conscience] is informed not by the judge's personal views, nor by the judge's views as to what policy is best."<sup>612</sup> Huddart also puts forward the belief that impartiality involves demonstrating the courage to understand every party's interests from their individual perspectives and then make a decision based on the agency's mandate.<sup>613</sup> She also provides examples for structural guarantors of impartiality, specifically: 1) the oath of office provides for a public declaration of the decision-maker's commitment to be courageous and free of external influence; 2) institutional independence; 3) public hearings; 4) a code of conduct for decision-makers; 5) published guidelines and policies for what will be considered and how decisions will be made; 6) the requirement to provide reasons; 7) immunity from litigation; and 8) education and training for building an

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<sup>611</sup> Huddart, *supra* note 334 at 151. An alternative point of view exists in the literature of judicial decision-making as to the import and acceptability of the impact of personal conscience. Of particular note in this discussion is the argument made by H. Jefferson Powell in *Constitutional Conscience: The Moral Dimension of Judicial Decision*, (Chicago, University of Chicago Press, 2008). Although it is beyond the scope of this dissertation to explore this influence, to learn more about how 'personal conscience' factors into judicial decision-making, please see the following examples for various points of view: Benjamin L. Berger, "The Abiding Presence of **Conscience**: Criminal Justice Against the Law and Modern Constitutional Imagination" (2011) 61 University of Toronto Law Journal 579.; William Blake, "God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences" (2012) 65 Political Research Quarterly 814.; Benjamin Cardozo, *The Nature of the Judicial Process*, (New Haven: Yale University Press, 1928); Sarah M. R. Cravens, "In Good Conscience: Expressions of Judicial Conscience in Federal Appellate Opinions", (2013) 51 Duquesne Law Review; Owen M. Fiss, "Objectivity and Interpretation" (1982) *Faculty Scholarship Series*. Paper 1217 <[http://digitalcommons.law.yale.edu/fss\\_papers/1217](http://digitalcommons.law.yale.edu/fss_papers/1217)>.; Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, "Inside the Judicial Mind" (2001) 86 Cornell Law Review 777.; Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases" (2007) 93 Cornell Law Review 1.; John Irwin & Daniel Real, "Unconscious Influences on Judicial Decision-Making" (2010) 42 McGeorge Law Review 1.; Dennis R. Klinck, "The Unexamined "Conscience" of Contemporary Canadian Equity" (2001) 46 McGill Law Journal 571.; Dennis R. Klinck "The Nebulous Equitable Duty of Conscience" (2005) 31 Queen's Law Journal, 206.; Paul V. Niemeyer, "Law & Conscience" (1993 – 1994) 69 Notre Dame Law Review 1011.; Chad M. Oldfather "Judges as Humans: Inter-Disciplinary Research and the Problems of Institutional Design" (2007) 36 Hofstra Law Review 125.; Gregory C. Siske, Michael Heise, Andrew P. Morris, "Searching for the Soul of Judicial Decision-Making: An Empirical Study of Religious Freedom Decisions" (2004) 65 Ohio State Law Review 491.

<sup>612</sup> Beverly McLachlin, "Unwritten Constitutional Principles: What is Going On?" New Zealand Journal of Public and International Law, 4 (2006) at 162.

<sup>613</sup> Huddart, *supra* note 334 at 151.

atmosphere that respects and expects courage and integrity.<sup>614</sup> Justice Huddart also uses the 'tool box' metaphor to describe ways and means that assist the decision-maker to be and be seen to be impartial. The tools she recommends include: 1) understanding of and application of fairness standards appropriate to the circumstances and ensuring procedural fairness is provided to the parties; 2) recognition that bias or its appearance contravenes the duty of fairness; 3) going beyond minimum legal requirements; and 4) truly understanding the mandate of the agency, board or tribunal.<sup>615</sup>

Justice Huddart's precise definition of impartiality is:

It is to get into the skin of another. This capacity lets a decision-maker enter the minds and situations of those affected by her decisions. This is "decisional impartiality" for me. It goes beyond disinterest to what Madam Chief Justice McLachlin calls "objective insight". It is to listen, to understand, and only then to decide.<sup>616</sup>

In examining this recommendation one might wonder if it is actually possible for the very privileged individuals who serve as judges and Ombuds and ADR practitioners to actually inhabit the 'skin of another' who lives a life which is the opposite of their own experiences with respect to education, economic stability, minority status, etc. Obviously, being highly motivated to do so is important. However, it is equally important to understand while it may not be possible to do so in all instances, a more practical strategy is to listen carefully and to empathize to the greatest extent possible. One might also question whether it is possible to listen equally intently to each party. While it may be difficult, it strikes me as being possible to do so, if the listener is disciplined, skilled and committed to the importance of acquiring the necessary insight for engaging in a fair process and providing for a fair outcome. Huddart's thesis is similar to that of Lorne Sossin who has explored

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<sup>614</sup> *Ibid.* at 152 - 158.

<sup>615</sup> *Ibid.* at 167.

<sup>616</sup> *Ibid.* at 170.

administrative decision-making as it relates to the provision of benefits and services and the notion of impartiality and fairness. Sossin advocates for a style of 'intimacy' which he defines in the administrative context as an open exchange of information based on a deep understanding of what it is like to be one another which is achieved through empathy and trust and recognition of the claimants' and the bureaucrats' mutual interdependence.<sup>617</sup> In addition to Justice Huddart's commentary on the attitudinal 'ways and means' of impartial thought, as summarized above she provides her encouragement for the use of various structural criteria to guide decision-makers' thinking, (e.g. fairness standards, Codes of Conduct/Ethics) and demonstrates the not uncommon view that independence, impartiality and fairness are interdependent.

In contrast, in expressing her resistance to the view that impartiality can be built on the aforementioned guarantors, Judith Resnik has indicated unequivocally, using her particular feminist lens, that "...impartiality and disengagement can never be achieved, hence all judgment is (sub rosa) suspect, hence we are always living in a second best world in which we cover our tracks with doctrines of insulation".<sup>618</sup> Presumably Resnik's reference to 'insulation' includes the various types of institutional structures and codes of conduct endorsed by Justice Huddard.

Once again, yet taking a different approach, in opposition to Resnik's view, Chief Justice's McLachlin, also an acknowledged feminist,<sup>619</sup> believes judicial impartiality can be achieved.<sup>620</sup> Her specific prescriptions include: the development of 'conscious objectivity' which is based on the premise that the decision-maker recognizes her mind is not a blank

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<sup>617</sup> Sossin, *supra* note 326 at 811.

<sup>618</sup> Judith Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges", 61 South California Law Review, (1987 – 1988) at 1943.

<sup>619</sup> Beverley McLachlin, "Remarks of the Right Honourable Beverley McLachlin, P.C. Retirement Ceremony of the Honourable Claire L'Heureux-Dubé" (10, June 2002), online: Supreme Court of Canada <<http://www.scc-csc.gc.ca>>.

<sup>620</sup> McLachlin, *supra* note 399 at 6.

slate and there are both positive and negative predispositions to be taken into account. In her view, via introspection, a judge can identify where her personal values conflict with her duty to render an impartial judgment. Chief Justice McLachlin also requires openness of mind which allows the decision-maker to truly hear what is said and to be convinced by what is said even when the information provided conflicts with her own perspectives. Her final admonition is that a decision-maker must develop a high level of empathy in order to "...recognize the legitimacy of diverse experiences and viewpoints".<sup>621</sup> Chief Justice McLachlin makes the crucial point that empathy does not mean adopting a particular viewpoint but rather it requires the decision-maker "...to attempt to imagine how each of the contenders sees the situation".<sup>622</sup> Needless to say, these requirements are not easily met and their simplicity of expression should not be conflated with ease of accomplishment. Rather these cognitive strategies, in my view, illustrate the sophistication required for recognizing the pervasiveness of ethnocentrism, sexism, racism, classism, etc. while using intellect, emotion and experience to reduce their impact.

In providing her view on the way forward for impartiality, Patricia Hughes, now the Executive Director of the Law Commission for Ontario, opines that "...all of us, including judges, have our own tentative and partial perceptions"<sup>623</sup> and the task at hand is to become impartial when determining the outcome of a case. She cites the SCC as "...tentatively articulating a new understanding of judicial impartiality appropriate for a self-consciously pluralist society".<sup>624</sup> She reviews the reasons provided by the majority and the dissent in *R.D.S.*<sup>625</sup> to demonstrate the SCC held it was acceptable for a lower court judge

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<sup>621</sup> *Ibid.* at 9.

<sup>622</sup> *Ibid.*

<sup>623</sup> Patricia, Hughes. "A New Direction in Judicial Impartiality" (1997-1998) 9 *National Journal of Constitutional Law* 251.

<sup>624</sup> *Ibid.*

<sup>625</sup> *R.D.S. supra* note 397.

to take into account social context and therefore there was not a reasonable apprehension of bias when the jurist chose to believe the accused person's version of events over those of a police officer. As described in detail earlier, in *R.D.S.* a judge who is a black woman found the young black man's account of what had transpired more credible than the account provided by the white male police officer. Hughes asserts a new definition for the 'reasonable person test' has been established through this case as it is acknowledged judges *will* bring their perspectives to bear on the cases before them. However, the new test includes whether they have considered their perspectives appropriately. Hughes' assertion that this type of reflective analysis must be done is predicated on the belief that inappropriate stereotypes must not be allowed to prevail and that 'social context' and 'life experience' are properly considered. Hughes cites the acknowledgement made by Justices L'Heureux-Dubé and McLachlin of the acceptability of influences from judges' life experience on their decision-making in relation to the test for 'reasonable apprehension of bias' by them stating that it is:

...inevitable and appropriate that the differing experience of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.<sup>626</sup>

These two high ranking jurists further refine their view of what is and is not bias by explaining judges must determine if they have analyzed their views appropriately to ensure their personal views are not having too great an influence prior to making a determination by stating:

We have established the legal fiction of separation of judicial body from human mind. By 'human mind' I mean human emotion, human prejudice, human predisposition, and human frailties. It cannot be done. And therefore we must develop rules to guide the scope within which the judicial body can act within the

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<sup>626</sup> *Ibid.* at para 29.

revelation of the human mind. The judge loses the freedom to be defined by his or her human mind, which must now be circumscribed. This is all we can mean by impartiality. Thus it is not a lack of predisposition but an openness of mind that really characterizes the impartial judge.<sup>627</sup>

Sossin agrees with Hughes' summary of the SCC's view in that he notes it has been "...recognized, (albeit by a narrow majority) that it is appropriate to view judges as products of particular values, beliefs and experiences and that components of a judge's personality will have some influence over their decision-making".<sup>628</sup> In his own examination of impartiality and reasonableness within the arena of administrative law, Sossin also emphasizes that an open mind is not predicated on blankness or the absence of knowledge of the matter under review and instead argues for a greater level of knowledge and understanding that comes from a deeper level of communication between those affected by decisions made and the people who are making them. Arguing for the benefits of this kind of approach, he envisions the pursuit of intimacy rather than anonymity and distance providing for the opportunity for the decision-maker to 'walk in the shoes' of the parties affected by the decisions as a contributor to impartial and fair decision-making.<sup>629</sup>

#### Procedural Impartiality

Another legal scholar, William Lucy, who has British, American and Canadian experience, has stated unequivocally that people can actually achieve one form of impartiality and that is what he calls 'procedural impartiality'.<sup>630</sup> He defines this form of impartiality as the application of impartial rules that do not favour either party to the dispute or they favour them equally. Also, as impartiality is embedded into the role and is understood to be so by the mediator, arbitrator, referee or adjudicator, the parties involved

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<sup>627</sup> *Ibid.* at para 21.

<sup>628</sup> Sossin, *supra* note 326 at 819.

<sup>629</sup> *Ibid.* at 820, 821.

<sup>630</sup> William Lucy, "The Possibility of Impartiality" (2005) 25, 1 Oxford Journal of Legal Studies at 24.

in the dispute see these characteristics as an essential element of the role and expect to be bound by known rules. His view is if individuals make decisions in such a fashion that everyone involved has access to and is able to participate in properly, which is to have all of the information about the role and process; to be heard; and to be able to respond to what others have said about the matter in dispute, then human beings can indeed achieve procedural impartiality. However, Lucy's argument is tenuous in my view, as achieving procedural impartiality would be dependent upon each role, process and procedure being scrutinized beforehand to determine if it in itself is value-free or if it does unconsciously or unintentionally favour one gender or religion over another; those of one socio-economic class over another; those with particular abilities, or cultural beliefs, etc. Hence, I would argue, even with the best of intentions, the actual implementation of procedural impartiality would be difficult, if not impossible to achieve.

#### Race and Class Analysis

The comments of the Honourable Madame Justice M.E. Turpel-Lafond,<sup>631</sup> formerly a judge in the Provincial Court of Saskatchewan and now the British Columbia Representative for Children and Youth and an aboriginal woman, exemplify what many would have considered to be a fair and procedurally impartial system to actually be the opposite. Specifically, Justice Turpel-Lafond calls for the justice system to continue to innovate based on input from a wide range of voices in order to address the fact that, in her words, "...aboriginal people are grossly overrepresented..."<sup>632</sup> in the criminal justice system. She also points out that all of the studies done on the system over many years have confirmed the perceptions of First Nations and Métis people that the justice system is

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<sup>631</sup> Ms. Turpel-Lafond is currently on leave from the bench and was appointed in 2006 as the province of British Columbia's Representative for Children and Youth, a.k.a. as the Children's Advocate.

<sup>632</sup> M.E. Turpel-Lafond in "Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System" Saskatchewan Law Review, (2005) 68 Saskatchewan Law Review at para. 18.

racist and culturally biased against them.<sup>633</sup> However, she is hopeful this perception can change as a result of a Cree Court established in northern Saskatchewan lead by Judge Morin, which has resulted in the implementation of an alternative vision. By building a court that is culturally and linguistically sensitive and expert in aboriginal ways, the delivery of justice in that setting is now seen to be 'human' and credible.<sup>634</sup> Her description of what has transpired as a result of changes in process fits very well with the understanding that the procedures within the system itself have to be scrutinized and when found to be uni-dimensional or biased in favour of a particular culture, changed in order to be fair. It is noteworthy that this successful aboriginal court has the benefit of a decision-maker who is knowledgeable, respectful and a member of what has been a traditionally disenfranchised and disengaged community. As a result of modifying the supposed 'impartial procedures' of the traditional court to be more accessible and congruent with First Nations' realities, this culturally specific Court is seen to be fair.

Another cultural vantage point is illustrated in the examination of benefits and disadvantages of the use of social context analysis in determining sentences for black women convicted of couriering illegal drugs. Sonia Lawrence and Toni Williams comment on the importance of challenging the traditional view of "...the criminal-justice system as a neutral arbiter of conflicts, meting out impartial justice and treating everyone as equal before the law".<sup>635</sup> Toni Williams demonstrates this reality by commenting on how the supposedly neutral characteristic of 'employment status' can have a dramatic unintended negative impact as it relates to race when sentencing decisions are being made about offenders within the criminal justice system. As the rate of unemployment is higher for

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<sup>633</sup> *Ibid.* at para.15.

<sup>634</sup> *Ibid.* at para 21.

<sup>635</sup> Sonia N. Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56 University of Toronto Law Journal 286 at 295.



black men than it is for white men and since judges have the discretion to take employment status into account when determining whether or not to incarcerate an offender, this social and economic factor can unintentionally contribute to injustice as it relates to race.<sup>636</sup>

### Gender Analysis

Given men have dominated the judiciary for centuries and rigid stereotypes about both men and women's behaviour have influenced society as a whole, it would be unreasonable to expect that decision-making processes as well as the minds of decision-makers would be free of gender bias. In assessing how decisions are made Kathleen Mahoney indicates the practices of institutions and the traditions that are part of dominant cultures will also be influential as will the impact of powerful precedents established on values that are discriminatory in and of themselves.<sup>637</sup> This uneven foundation is also supported by wrong-headed beliefs that women are likely to lie about sexual assaults or have provoked domestic violence by their behaviour.<sup>638</sup> As a result Mahoney advocates for judicial education lead by the judiciary itself that requires jurists to become aware of their own, unknown biases which are rooted not only in gender stereotypes, but are also prevalent with respect to racial, religious and ethnic groups and their presumed beliefs and behaviours.<sup>639</sup>

Patricia Cain postulates that feminist theory is useful for addressing the difficulty inherent in one person making judgments about another, while attempting to remain connected to that individual. She identifies the primary issues as the complexity of

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<sup>636</sup> Toni Williams, "Sentencing Black Offenders in the Ontario Criminal Justice System" in David Cole & Julian Roberts ,eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 200 at 212, 214.

<sup>637</sup> Kathleen E. Mahoney, "The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice" (1996) 32:4 *Willamette Law Review* 785 at 795.

<sup>638</sup> *Ibid.* at 798.

<sup>639</sup> *Ibid.* at 814.

differentiating between good and bad bias and staying connected throughout the process of judging.<sup>640</sup> Her four instructions for success in this arena are: firstly, don't just let one judge decide so as to prevent the dominance of a single perspective. By bringing in more perspectives there is more potential for good bias to prevail.<sup>641</sup> This admonition is consistent with the proposals made by Stribopoulos and Yahya for the construction of diverse Panels of appeal court judges and less forcefully, by Sunstein et al. In addition, Resnik, even though she uses a different feminist theory than Cain, also argues for "...more communal modes of decision-making insisting upon groups of two, three, or four judges to share the honor, the obligation, and the pain of decision".<sup>642</sup> Secondly, as was recommended by the CBA previously,<sup>643</sup> Cain advocates for judges being appointed who have a wider variety of experience and who make a conscious effort to have contact with people who are different from them.<sup>644</sup> Thirdly, she also encourages appeal courts to have the courage to acknowledge when 'bad' bias, e.g. racism, has affected a decision rather than reversing it on other less controversial grounds.<sup>645</sup> Finally, Cain encourages more 'story telling' so when cases are brought forward for adjudication the real details of the lives of the people involved and how they have been affected by the matters being reviewed are highlighted so that the judge and the litigant are less isolated from one another.<sup>646</sup> Cain's advice is consistent with the views espoused by Sossin in his analysis of ways and means for improving the fairness of administrative decision-making.<sup>647</sup> This recommendation is also consistent with one of the major components of many mediation

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<sup>640</sup> Cain, *supra* note 463 at 1946.

<sup>641</sup> *Ibid.* at 1949.

<sup>642</sup> Resnik, *supra* note 618 at 1924.

<sup>643</sup> Canadian Bar Association, *supra* note 606.

<sup>644</sup> Cain, *supra* note 463 at 1950.

<sup>645</sup> *Ibid.* at 1952.

<sup>646</sup> *Ibid.* at 1954.

<sup>647</sup> Sossin, *supra* note 326.

models which provide for the parties in dispute to begin the process by describing to each other what transpired from his or her perspective and why the actions taken have resulted in a dispute. In fact, in many mediation models and training manuals the term of 'story telling' is actually used to describe what each party is expected to do in the preliminary phase of their attempt to resolve their dispute. However, in implementing this important and useful technique the mediator (and adjudicator, arbitrator, Ombuds) must also take into account the fact that some parties are much more adept at telling their stories than others. As a result, care must be taken not to privilege those that are in that enviable position. In addition, Rifkin, Millen and Cobb state "Gender, age, racial and cultural differences – all these and more – potentially affect one's ability to construct a story that is recognized by others as coherent".<sup>648</sup> Given this reality, those that are responsible for facilitating story telling within adjudicative, inquisitorial and ADR processes must be very aware of ensuring all those involved are able to do so as effectively as is possible in order for any semblance of impartiality to prevail.

### Social Psychology Research Results

Susan M. Anderson and her colleagues who have rigorously researched the notion of 'automatic thought' provide some useful insight with respect to how stereotypical thinking can be modified. This research provides room for optimism with respect to the viability of the aspiration to impartiality. For example, their research that exposes participants to a 'social category cue' and examines whether subsequent judgments are influenced by attributes associated with that category, has shown that "...if a stereotype is available in memory, relevant cues can activate it without need of awareness, intention, effort, or control".<sup>649</sup>

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<sup>648</sup> J. Rifkin, J. Millen & S. Cobb, *supra* note 394.

<sup>649</sup> Susan Anderson et al., "Automatic Thought" Chapter 7 of Social Psychology: Handbook of Basic Principles edited by Arie A. Kruglanski & E. Tony Higgins (Guildford Publications: 2007) online: Project Implicit <<http://www.projectimplicit.net/articles.php>> at 141. The bold text is my emphasis.

However, they have also found there is potential for self regulation of thought, perhaps based on self reflexivity in that

"... the goal to comprehend and also the goal to avoid bias shape the way stereotypes and traits are activated and applied in both judgment and behaviour. These goals may contribute to the inhibition of knowledge activation or disrupt its application... Emergent evidence suggests that self-regulatory processes can take place **relatively unconsciously and effortlessly**..."<sup>650</sup>

Anderson et al have pointed out that while there are long-standing assumptions in place to indicate 'automatic stereotyping' is not alterable, they have concluded that "Self regulation can help people to avoid the effects of automatic stereotypes by suppressing biased impulses, attending to alternative sources of information (e.g., focusing on egalitarian responses), and attempting to correct for biased actions..."<sup>651</sup> They expound on this point to state the research conducted by Plant & Devine in 1998 and Moskowitz et al in 2004 shows that:

...Chronic egalitarians have a persistent goal to respond without stereotyping and prejudice... It is also apparent that 'chronic egalitarians' readily detect information relevant to the goal of being egalitarian and inhibit personal responses that are not compatible with being unbiased..."<sup>652</sup>

Anderson et al have also concluded that repeatedly attempting to suppress a stereotype can lead to always doing so, when stimuli that would invoke a biased response, appear. According to Anderson et al it has also been posited by Sechrist & Stangor in 2001; Sinclair, Lowery, Hardin, Colangelo in 2005 and Spencer, Fein, Zanna, & Olson in 2003, that simply deciding to behave in an unbiased way can have an impact on what would instead have been an automatic stereotypical response. This information has led to the belief as put forward by Devine, Monteith, Zuerwink & Eliot in 1991 and Monteith in 1993 that:

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<sup>650</sup> *Ibid.* at 155.

<sup>651</sup> *Ibid.* at 156.

<sup>652</sup> *Ibid.*

...In short, when people want to avoid bias, they may try to recognize when they have acted (or are about to act) in a way that falls short of their personal standards, in part because failing to do so would stimulate negative affect (guilt and disappointment)...<sup>653</sup>

This research leads to the important conclusion that conscientious and self-aware individuals can indeed educate and monitor themselves so as not to be influenced by 'bad' biases. As a result, this cognitive form of 'personal training' propels individuals to think and behave in a reflexive manner routinely, such that doing so becomes automatic, akin to the notion of 'muscle memory' that is present when performing a repetitive physical task, rather than requiring constant intellectual attention. While the motivation may be for personal benefit in that the impetus is to avoid feeling ashamed for behaving in a biased manner, the outcome is such that bad bias is reduced. The viability of this type of intellectual exercise speaks to the potential for building or modifying behaviours that pave the way for impartiality and independent thought.

Brian Nosek and Jeffrey Hansen provide a similar point of view that has been informed by the results obtained through the use of the Implicit Association Test (IAT) with 107,709 respondents. Their findings demonstrated that:

...Ownership of mental associations is established by presence of mind and influence on thinking, feeling and doing. Regardless of origin, associations are influential depending on their availability, accessibility, salience, and applicability...With awareness and control, one can opt to use his own evaluations to guide judgement and behavior, and choose not to use knowledge about others' evaluations...<sup>654</sup>

This discovery has important implications given Brown's research cited earlier in which it was demonstrated that homogenous groups are more likely to adopt polarized positions

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<sup>653</sup> *Ibid.* at 157.

<sup>654</sup> Brian Nosek & Jeffrey Hansen, "The Associations in our Heads Belong to Us: Searching for Attitudes and Knowledge in Implicit Evaluation" (2007) online: Project Implicit <<http://www.projectimplicit.net/articles.php>> at p. 3.

when making decisions or talking about issues.<sup>655</sup> It also speaks to the viability of an individual who thinks differently than others, to be successful when going against the grain, to dampen or intervene in the phenomenon of homogenous group think. It is important to recognize, though, that in order for any change in position to occur there must also be some willingness among the participants to consider the possibility of the legitimacy of an alternative point of view.

While some theorists and practitioners have come to the depressing conclusion that human beings have no or very limited ability to overcome automatic thought which is biased or prejudiced, these authors have determined through their review of the literature, specifically that of Gawronski & Bodenhaus (2006) and Strack & Deutsch (2004) that:

...humans also have the remarkable ability to unbelieve things that they once thought and believed. Distinguishing knowledge that is 'mine' from 'just the stuff that I know' is where explicit cognition has a decided advantage over implicit cognition. A luxury of conscious processes is that we get to decide whether we believe the information that bubbles up from memory.<sup>656</sup>

Nosek and Hansen specifically address the issue of stereotyping about race, gender, age and political affiliation and observe that when these stereotypes become known to us, their research demonstrates that we can use them to make decisions or dismiss them. For example, we can look to significant historical figures like Dr. Martin Luther King who exhorted us to make assessments of others on the basis of their characters and not their physical characteristics. In these researchers' experience tactics of this sort provide the means for human beings, with concerted effort, to change old views and/or reject those of a dominant culture as well as to perceive and interact with others in an unbiased manner as is possible.<sup>657</sup>

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<sup>655</sup> Brown, *supra* note 549.

<sup>656</sup> Nosek & Hansen, *supra* note 654 at 17.

<sup>657</sup> *Ibid.*

The foregoing research results inject a hopeful dimension for consideration in the debate as to whether or not individuals have the capacity to control their thoughts and work toward impartiality. Their findings indicate that it is reasonable to conclude there is the potential for human beings whether they practice in the field of traditional or alternative dispute resolution to think and act with a high degree of impartiality. However, there are caveats that must be acknowledged, such as a high degree of self-knowledge, strength of character, self-discipline, empathy, the ability to continually suppress bad bias as well as the good fortune to have inherited or developed sufficient cognitive capacity to continually acquire new information and challenge its authenticity.

#### The Nature of Independence

The impact of structural independence deserves further attention in this discussion given it has now been established through the research results presented on judicial and an administrative tribunal's decision-making that even though a decision-maker has no external influences other than those he chooses to pay attention to, he may still demonstrate inappropriate or unjustified bias. This outcome demonstrates if a decision-maker does not have the insight and personal discipline as well as the necessary level of intellectual capacity to recognize and suppress stereotypes and personal irrelevant predilections, the fact that he occupies a structurally independent post is immaterial. Without the requisite independence of mind, the highest degree of structural independence would not make any difference to the quality of his decision-making process and the resultant conclusions.

Madame Justice L'Heureux-Dubé asserted in 1996 in 2747-3174 Quebec Inc. v. Quebec (Régie des permis d'alcool) (*Régie*) that: "An agency's independence from the

executive is a prerequisite for, but is not sufficient to guarantee, impartiality".<sup>658</sup> This statement clearly supports the reality that structure alone does not ensure that a decision-maker will be unbiased and even-handed. Interestingly enough, when the former Right Honourable Chief Justice Laskin (Chief Justice Laskin) became a member of the SCC he said to those at his induction ceremony that:

(1) I had no expectations to live up to save those I placed upon myself; (2) I had no constituency to serve save the realm of reason; (3) I had no influence to dispel unless there was a threat to my intellectual disinterestedness; and (4) I had no one to answer to save my own conscience and my personal standards of integrity.<sup>659</sup>

Justice Laskin then recanted this commentary and later excused himself on the basis of the euphoria of the moment. He then rejected the import of the strength of his personal discipline and, ironically, given the findings cited earlier related to the observed influence of political biases in some areas of judicial decision-making, explained that the principle of judicial independence, which presumably he understood as being based on the traditional notion of a high degree of structural independence, would actually serve as his touchstone for his decision-making. Laskin's subsequent conclusion as to how he would safeguard his impartiality falls in direct opposition to the findings of social psychologists cited earlier with respect to the importance of self-awareness and self-discipline, while much of his initial euphoric recitation is much more in keeping with the notion of a 'chronic egalitarian'.

In 1986 Chief Justice Dickson in *Beauregard v. Canada (Beauregard)* provided the following less personalized definition for judicial independence:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the

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<sup>658</sup> *Régie*, *supra* note 335 at 106.

<sup>659</sup> Bora Laskin, "The Institutional Character of the Judge" (1972) 7, 3 *Israel Law Review* at 330.



way in which a judge conducts his or her case and makes his or her own decisions. This core continues to be central to the principles of judicial independence.<sup>660</sup>

It is important to note, however, that being structurally independent does not prevent a decision-maker from being influenced inappropriately or circumscribed by her own personal, internal beliefs or to make up for limited experience with and knowledge of other world views. Structural independence has limited value if the decision-maker has not expanded her personal horizons and examined her biases and how they have developed so as to be better equipped to limit their inappropriate influence.

Chief Justice Dickson's explanation of the necessity for and the benefit of, an 'influence-free' environment in *Beauregard* also demonstrates how vulnerable many ADR practitioners are to potential 'inappropriate' influence given the majority do not enjoy a high degree of structural independence. For example, it is reasonable to ask to what degree are ADR practitioners influenced, either knowingly or unknowingly, to agree with a particular point of view for strategic reasons, such as to qualify for renewal of an appointment; or to maintain or repair relationships that facilitate expeditious resolution of issues; or to increase access to needed resources; or, to be seen to be collegial or easy to work with to ensure their budgets are approved; or, to be chosen by parties for assistance with the resolution of future disputes, e.g. arbitrators or mediators who are chosen from rosters and must be acceptable to all parties.

Diana Ginn undertook a useful examination of a series of decisions made on applications for judicial review for a two-year period where it was alleged that a decision-maker was not impartial or not independent.<sup>661</sup> The findings she conveyed are in line with

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<sup>660</sup> *Beauregard v. Canada*, [1986] 2 S.C.R. at para. 21.

<sup>661</sup> Diana Ginn, "Recent Developments of Administrative Law and Practice" (1997-1998) 11 Canadian Journal of Administrative Law and Practice at 25.

the literature reviewed earlier with respect to impartiality in that she demonstrated that the judicial standard applied to decisions made by administrative tribunals was one of a reasonable apprehension of bias. The allegations which were adjudicated included institutional bias; association between the decision-maker and one of the parties; and attitudinal bias/antagonism.<sup>662</sup> Whereas, for allegations related to policy and legislative matters, (e.g. decisions made by municipal councils), the lower standard of 'the closed mind test' was applied. With respect to the allegation of institutional bias, it is worthy of emphasizing that Ginn was struck by the fact that Justice Gonthier dismissed categorically the possibility of a reasonable apprehension of bias on the basis of a desire for collegiality or to show deference to a more senior colleague with the following words:

They [the comité] have nothing to gain by not deciding as their consciences dictate and nothing to lose by doing justice. There is accordingly no reason to fear that Comité members would be influenced by the language of the complaint or the particular status of the author.<sup>663</sup>

Ginn was surprised that the potential impact of close relationships could be dismissed so summarily. However, it appears Justice Gonthier arrived at his conclusion on the basis that judges are not only trained to be dispassionate but also take an oath of impartiality. These characteristics follow in the same tradition as the 'guarantors of impartiality' outlined by Justice Huddart. To suggest a tribunal or Conseil member or by extension another ADR practitioner has nothing to gain by making a decision favourable to an individual with whom he has regular professional or personal contact strikes me as being disassociated from reality. Rather, it is self-evident that avoiding being influenced by a friendly, ongoing relationship actually requires a very high degree of self-awareness and

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<sup>662</sup> *Ibid.* at para 32.

<sup>663</sup> *Ibid.* at para 33. This verbatim citation is excerpted from *Ruffo v. Conseil de la magistrature* (1995) 130 D.L.R. (4<sup>th</sup>) 1 at 18 (S.C.C.) at 42. In this instance no indication or hint is provided as to whether Justice Gonthier is referring to the tribunal members' 'personal conscience' or the tribunal members' equivalent of 'judicial conscience'.

demands considerable strength of character to overcome the desire to be congenial when the facts of a case require a decision-maker to make an unfavourable finding or impose a sanction, that has a profound negative impact on his friend or associate. While Justice Gonthier emphasized the importance of judicial training and a commitment to impartiality as the basis for his confidence in the objectivity of the decision-makers it would seem that it should also have been acknowledged how difficult it is to acquire and maintain the high degree of self-discipline, predicated on self-awareness that is the basis for impartiality.

#### The Integration of Independence and Impartiality

Ginn's analysis with respect to impartiality and independence is particularly valuable at this juncture as she emphasizes to a greater degree than some of the authors and commentators cited earlier that while independence and impartiality are interrelated they must also be seen as separate concepts. It is worthy of reiterating that the jurisprudence and some of the commentary cited earlier emphasized the import of a high degree of independence for preserving the perception of impartiality. This declaration is particularly controversial given the research cited on some aspects of judicial decision-making that verified the influence of political affiliation in environments that enjoy a very high degree of structural independence. The lack of personal independence, or an independent mind-set, which is readily evident in decisions issued by those who operate in structurally independent environments, should motivate reflection on the multitude of ADR practitioners' roles which are not established by legislation and have very little structural independence yet aspire to and indeed assert that they are independent. For example, some mediators, conciliators, facilitators, Ombudspersons are employees of the organization, government department, hospital or bank or university in which the work is done. As result of these employment relationships alone, the three indicia of

independence laid out in *Valente v. The Queen* (*Valente*) as 'security of tenure, financial security and institutional independence'<sup>664</sup> are either at risk or non-existent in many ADR roles. Specifically, legislation, policy and terms of reference which provide for renewable terms of service with no assessment criteria specified can provoke reasonable perceptions of lack of independence as the incumbent would be constantly aware of the potential for not being renewed every few years. Similarly, having your budget or salary increases approved by those whose decisions you are investigating is also rife with potential for perceptions of and/or actual inappropriate influence.

#### Addressing the Challenges to Impartiality and Independence

As a result of reviewing key elements of the legal and ADR literature and empirical research on judicial and administrative tribunal decision-making, in addition to the social psychological research on stereotyping as well as Canadian jurisprudence, it is clear the notions of independence and impartiality have evolved over time. Laudably, a new definition and standard for impartiality is being promulgated. At the same time the feasibility of neutrality has been summarily and in my view, appropriately rejected. Similarly, the traditional belief that impartiality flows directly from independence is now known to be hollow,<sup>665</sup> as it is observable from the empirical research on judicial decision-making alone that a high degree of structural independence does not necessarily generate impartiality. Furthermore, I would posit it is reasonable to expect that judicial decision-makers and ADR practitioners should readily acknowledge the difficulty of achieving impartiality and independence of thought and action. As a result of this acknowledgement they will be better positioned to demonstrate how they deal with 'good and bad bias' both

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<sup>664</sup> *Valente v. The Queen*, [1985] 2 S.C.R. 673.

<sup>665</sup> This opinion is similar to that espoused by Lorne Sossin in relation to bureaucratic decision-making and that of administrative tribunals. See note 326.

in determining how they do their work and arrive at their conclusions. These kinds of efforts along with a high level of transparency will assist those who are affected by their decisions and/or their interventions to understand how decision-makers hold themselves accountable for the appropriate use of social context as well as their own experience. Similarly, when the opportunity to influence public policy in a particular way is afforded to decision-makers and ADR practitioners, in order to successfully meet the challenge of independence and impartiality it should also be expected that they will consistently demonstrate their willingness and ability to hear a myriad of voices and opposing points of view on how society should be organized.

Instead of being disconnected and disinterested as the lore of former definitions of impartiality and independence proclaimed, Patricia Cain puts forward the working theory from her feminist perspective, (in opposition to Judith Resnik's differing feminist perspective), on how a judge can successfully deal with the complexity of being connected with an individual and the story that is being told while also making a decision about that story and the future of the individual or her rights and responsibilities. Cain's remedy is to "...transcend self to listen, then a judge should decide with empathy and understanding – as a new self, if you will, for having experienced the story of the other".<sup>666</sup>

In my view the same prescription should be given to those who occupy third party roles in any forum used for alternative forms of dispute resolution, as it is unreasonable to suggest that human beings in any context can (or should) excise their experiences from their minds. On the other hand, it is completely reasonable to expect and indeed require that decision-makers, complaint handlers, Ombuds, mediators, arbitrators operate as conscientious, disciplined human beings who must not only open their minds to alternative

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<sup>666</sup> Cain, *supra* note 463 at 1955.

points of view, but immerse themselves in the stories brought to their attention. By considering these narratives and the information collected in relation to the fairness standards, terms of reference, policies or regulations that are being used to decide on what is an appropriate process and fair outcome, the highly motivated and introspective practitioner has the best means for thinking as impartially as possible and demonstrating a high degree of independence. The following chapters will now bring the viability of the concepts of impartiality and independence to life through the new lens of experiences and insights of Ombuds gathered through the qualitative research process.

## **Chapter 4 Research Methodology and Execution**

### **Detailed Methodology**

The primary methodological underpinning for this qualitative research project is the production of grounded theory through the method of constant comparison. In addition, as a result of the approach taken and my academic influences, I have also engaged in a complementary mode of analysis, that being 'critical legal analysis' which involves in-depth scrutiny of the terms under study. In this section I will detail how the empirical research was conducted and the data set was analyzed.

### **Data Collection Methodology**

#### **Style of Interviews and Type of Interviewee**

The data were collected through the use of semi-structured interviews<sup>667</sup> with elite interviewees, who are defined as individuals who are knowledgeable about the subject matter, influential within their organizations or their respective communities, and typically in society generally.<sup>668</sup> While it was observed in the methodological literature that elite interviewing can be problematic as it is difficult to gain access to this type of interviewee as their time is limited<sup>669</sup> and they may be difficult to contact, this was not my experience. Even though it took some time to connect with some of the interviewees, given that their direct email addresses were not in the public domain, every person who was invited to participate responded in the affirmative with the exception of one person whose personal situation made it impossible to participate at that time. It has also been observed that interviewing this type of individual can be difficult as they may wish to control the interview

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<sup>667</sup> Raymond Garrison, *The Art and Science of Research Interviewing* (Toronto, Ontario: York University, Institute for Social Research, 2008) at 4.

<sup>668</sup> Marshall & Rossman, *supra* note 22 at 94.

<sup>669</sup> *Ibid.*

or will resent what they consider to be narrow questions.<sup>670</sup> Again, this was not my experience, perhaps due to the personalities of these particular interviewees and their great interest in the subject matter as well as their willingness to share their views for the benefit of Ombuds practitioners, scholars and the users of these services.<sup>671</sup>

Consistent with the semi-structured interview approach or 'the interview guide' variation of qualitative interviewing<sup>672</sup> as defined by Michael Quinn Patton, I compiled a set of open-ended questions which is shown at Appendix B. This approach allowed for flexibility as was appropriate to the situation as it gave me the ability to probe and explore new directions as was warranted. However, I found it very helpful to have a list of carefully delineated questions at my fingertips, rather than relying solely on a more informal conversational approach, as this framework assisted me to make optimum use of these very busy interviewees' time and input. While all of the interviews moved along at a comfortable pace I was always mindful of my interview schedule so as to be sure I covered all of the issues germane to this study. While I did not follow the order of the questions if the interviewee introduced the topics at different times, I did not find they attempted to wrest control of the content of the interview in any way. Rather, I found that all of the issues raised were relevant to my research. As a result I was able to assemble concrete and complete information for comparative purposes. In addition, the manner in which the interviewees' expressed their views allowed me to build a comprehensive database of the interviewees' strategies for recognizing and overcoming bias and on their perceptions of complainants' and respondents' perceptions on fairness and if they were

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<sup>670</sup> *Ibid.*

<sup>671</sup> Many of the interviewees commented on the need for more Canadian focused research in the Ombuds field and reiterated their desire to assist in the accumulation of knowledge related to theory and practice the Ombuds role. Interestingly, one interviewee self-identified as an 'ombuds nerd' to underscore the degree of attention dedicated to thinking about how Ombuds roles should be constructed and implemented.

<sup>672</sup> Patton, *supra* note 11 at 343.



connected to independence and impartiality. Only one interviewee asked me for guidelines for the discussion in advance and I provided them on the basis that they would be held in confidence and destroyed after the interview. I made this request in order to ensure the questions I had in mind were not used for any other purpose, (e.g. training or education sessions), prior to my research being completed.

With respect to the length of the interviews, each session was scheduled for one hour. However, notwithstanding this expectation, the majority of the interviews extended to at least 90 minutes and some continued for approximately two hours.

### Sampling Strategy

Initially, I used the method of non-probability sampling known as purposive or judgmental sampling which has been identified by Newman as appropriate for specialized situations in exploratory field research.<sup>673</sup> When using this method for selecting a sample of participants a researcher who is knowledgeable about the field of study, uses her judgment to select interviewees with a specific purpose in mind. In this instance my goal was to interview a diverse group of experienced and well-informed Ombuds and staff. I also used the strategy of purposive sampling<sup>674</sup> as defined by Padgett, as my interest was in the quality of each interview rather than in conducting a large number of interviews for the purpose of voluminous data generation. Also, purposive sampling is appropriate for a study where the sample size does not have to be finalized prior to the research being conducted as is the case when theoretical sampling is also being used. In addition it is important to acknowledge that when using a purposive sampling approach it is rare that

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<sup>673</sup> W. Lawrence Newman, *Social Research Methods: Qualitative and Quantitative Approaches* (7<sup>th</sup> edition) (Boston: Allyn & Bacon, 2011) at 267.

<sup>674</sup> Glenn A. Bowen, "Naturalistic inquiry and the saturation concept: a research note" 2008 *Qualitative Research*, 8(1) 137 at 142.

the interviewees selected are representative of the whole population.<sup>675</sup> As my objective was to be thoroughly saturated with relevant information from individuals with a high level of expertise and thoughtfulness, I selected individuals who had a minimum of two years experience in an Ombuds role. In addition, 50% of the interviewees had more than ten years of experience in the Ombuds field. As it was very important from my vantage point to interview individuals who were not only conversant with the Ombuds role, whether it be legislative, hybrids or organizational, but were also illustrative of the diversity of Canadian demographics, I developed a matrix that included the following criteria along these axes: geographical location<sup>676</sup>, gender, language,<sup>677</sup> race, model of practice and type of Ombuds role. I then sought out names of potential interviewees and contact information so as to populate the matrix as fully as possible. Using all of the foregoing information I then composed a preliminary list of interviewees who were reflective of diverse demographic characteristics and included equal numbers of potential participants from the three models of Ombuds practice.

In my view it was also crucial to interview Ombuds staff as well as individual Ombuds, as staff are not only implementing the concepts under discussion regularly they are also required to articulate why and how they are doing so to complainants and respondents on a daily basis, in fact much more frequently than an Ombuds of a large office is required to do. In addition, I deliberately did not interview any staff of any Ombudsman/person who was recruited as an interviewee (other than in one instance and

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<sup>675</sup> Newman, *supra* note 673 at 267.

<sup>676</sup> I chose a wide range of geographical locations in order to have as broad a range of possible interviewees and operated on the premise that I would find some means to interview them in person if they accepted my request to participate. In a number of instances they were willing to meet with me while passing through Toronto or while attending a conference in Montreal. In other instances in order to maintain the integrity of my sampling strategy I traveled to their offices to meet with them.

<sup>677</sup> I deliberately chose Francophone interviewees to ensure the majority Anglophone population did not dominate the project.

that occurred by happenstance for logistical reasons) in order to avoid any potential discomfort on the part of either interviewee.

I also engaged in a theoretical sampling strategy<sup>678</sup> in that my original plan was to interview five Ombuds from each of the three models of practice and five Ombuds staff from various models and sectors for a total of 20 interviews. As the interviews progressed it became apparent that individuals who I thought practiced in the organizational model actually conducted investigations and should therefore be classified as hybrid Ombuds. As a result I deliberately sought out additional interviewees from the organizational model of practice. In addition, in one instance I interviewed an Ombuds and two staff from the Office as an unexpected situation arose whereby the Ombuds learned just prior to the interview that less time than originally anticipated would be available. The staff was on hand to complete the interview after the Ombuds' departure. Even though this Ombuds' availability was unexpectedly truncated a very generous amount of interview time was provided. Ultimately, my sample included nine interviewees from the hybrid model, seven interviewees from the legislative model and four interviewees from the organizational model.

In addition, three of the people I interviewed I had actually worked with before and I chose them specifically as they had substantive experience in the Ombuds field and each had occupied a number of different roles throughout their careers in the Ombuds field. It seemed likely to me that given their lengthy and varied experience and the dedication they demonstrated to their work that they would be interested in and have considerable sensitivity to the issues under review. In assessing the possibility that our prior working

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<sup>678</sup> Melanie Birks & Jane Mills, *Grounded Theory A Practical Guide*, (London: SAGE Publications Ltd., 2011) at 11. Birks & Mills emphasize the importance of making strategic decisions about additional interviewees as the iterative process demonstrates that additional data is needed from different sources in saturate the categories that are being compared.

relationships may have influenced the type or quantity of information provided I came to the conclusion that our prior relationship did not have any obvious negative impact on the collection of data as the conversations flowed freely and the participants expressed a wide variety of differing opinions. It is also important to note that I had also met seven of the interviewees at conferences or workshops previously. As a result I had some knowledge of the 50% of the interviewees in a professional capacity. While I had previous conversations with some of these interviewees in a social situation while attending a conference or workshop or professional event, the nature of our relationship was not that of a personal nature. As the objective of qualitative interviews is to create a dynamic of reciprocity between the interviewee and interviewer rather than to replicate that of a hierarchical nature which was the norm from a positivist perspective with respect to empirical work<sup>679</sup>, the fact that we were peers to some degree or had knowledge of each other above and beyond the researcher/participant dyad was a positive addition to the process as it was not necessary to dedicate a great deal of time to establishing a comfortable environment. For instance, in all of the interviews, each participant spoke confidently and easily without hesitation and showed no reluctance to provide what turned out to be differing points of view on any of the subjects discussed. Also, at the end of each interview, each of these interviewees (as well as many others) commented on how much they enjoyed thinking about and discussing the principles I was studying. I also chose some Ombuds who were relatively new to the field in order to provide the opportunity to hear 'fresh' perspectives as well. In addition, as many of the Ombuds I identified in my matrix had a background in law I deliberately added Ombuds with different academic backgrounds to the sample, via the use of a theoretical sampling strategy, in the event

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<sup>679</sup> *Ibid.*, at 58.

based on the data that emerged, I saw some value in comparing and contrasting perceptions on the basis of a legal to non-legal academic and professional background.

Due to the generosity of the interviewees I was able to interview people from all regions of Canada, that is, the west, the east, the prairies, the north and central Canada. As well, in order to be reflective of Canadian demographics with respect to gender I was conscious of maintaining a sample of 50% men and 50% women. I became aware at the 18th interview that the point of saturation had been met as no new information was being provided. However, the two subsequent interviews provided substantial depth and richness with respect to clarity and complexity of the same subject matter. I am aware that there is some controversy regarding the notion of the validity of a saturation point, that being as described by Bertaux and Bertaux-Wiame, as "This point is reached when your data begin to stop telling you anything new about the social process under scrutiny".<sup>680</sup> Similarly, in reference to sociological inquiry, Glaser and Strauss define 'theoretical saturation'<sup>681</sup> as being demonstrated by the researcher seeing the same information being repeated. Those who have critiqued this parameter have done so on the basis of querying how a researcher could demonstrate that the point of saturation had actually been reached. In an effort to address that criticism, I have been able to confirm by assembling the interview transcripts in chronological order of first to last conducted, that it is readily evident that no new ideas or thoughts were presented in any category after the 18th interview. However, the 19<sup>th</sup> and 20<sup>th</sup> interviewees' views continued to be instructive as the *manner* in which the previously presented ideas and thoughts were expressed was thought provoking and enriched the overall dialogue. Glaser and Strauss also noted that the researcher should be looking for the greatest level of diversity so that saturation is

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<sup>680</sup> Mason, *supra* note 8 at 137.

<sup>681</sup> Glaser and Strauss, *supra* note 10 at 61.

based on a wide range of possibilities.<sup>682</sup> Keeping this expectation in mind, to be sure that I had not come to a premature conclusion with regard to saturation and in order to maintain a diverse group of interviewees, both with respect to demographics and style of practice, I conducted two additional interviews. Finally, my original plan was to complete the interviews over a three-month period. However, I lengthened the time frame to a six-month period in order to ensure that I had as wide a spectrum of input as possible. On the basis of the foregoing I would argue that the approach taken in this regard was not as detractors have said "...ad hoc and unsystematic..."<sup>683</sup> and without any doubt had the desired result of dramatically increasing my understanding of a wide spectrum of points of view and positions on independence and impartiality as well as their connection to fairness.

#### Requests for Interviews

Each interviewee was sent a two-page interview request via email in February of 2009. The template used to prepare the individual requests and to explain the ethical considerations so as to ensure informed consent is attached at Appendix A. Given the length of time I have worked in the Ombuds field, 50% of the individuals I contacted knew that I was working in the field as an Ombudsperson. The other interviewees had no knowledge of my background as we had not met before. I deliberately did not say in the letter of invitation to potential interviewees that I was active in the Ombuds field as I wanted to emphasize that I was undertaking this research solely as a doctoral student so that the recipient knew immediately that I was doing academic research. My fear was that if I included information about my current and past Ombuds' roles that the interviewees may erroneously conclude that the research was more practically oriented and descriptive

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<sup>682</sup> *Ibid.* at 63.

<sup>683</sup> Marshall & Rossman, *supra* note 22 at 97.

in nature. In addition, I did not want interviewees to speak in 'ombuds short hand' or 'ombuds talk' as I thought the potential richness of their commentary could have been diluted, if that route was taken. At the close of the interviews, a number of interviewees suggested other people who they thought would enjoy participating and offered to speak to them on my behalf if I wanted them to do so. I thanked them for their offer of assistance and declined to follow up as I wanted to maintain as varied an interviewee group as possible based on the systematic sampling strategy described above.

#### Mechanics of the Interview Process

Consistent with the expectations for grounded theory methodology, which is designed to create a more egalitarian and less hierarchical approach to the collection of interview data, all interviews were scheduled based entirely on the participant's choice of time, geographical location and venue; the interview guide was not applied in a rigid manner; and the interviewer and the participants engaged in a open dialogue which appeared to flow naturally from topic to topic.<sup>684</sup>

Based on the preference of the interviewee, the majority of interviews were conducted in each participant's office. Due to geographical locations and travel itineraries, three interviews were conducted in hotel conference centres (complete with banging tables and staff shifting furniture) in various metropolitan locations across Canada; three interviews were conducted in an Executive Centre Office in Toronto, Ontario; two interviews were conducted in a meeting room in the Osgoode Professional Development Centre of Osgoode Hall Law School in Toronto, Ontario and one interview was conducted in my own office building in Toronto, Ontario. I attempted to find an alternative less personal space for this interview but all of the other spaces that were more appropriate for

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<sup>684</sup> Birks & Mills, *supra* note 12 at 58.

this purpose were booked and the interviewee was only available for the interview in Toronto for a specific time period on one particular day.

Nineteen of the interviews were recorded in their entirety using a digital audio recorder. Unfortunately, the recorder malfunctioned at the halfway mark in one interview so I was dependent on my handwritten notes for capturing part of the data. As I am accustomed to taking notes and hand writing a great deal of verbatim commentary given the nature of the work I do in a professional capacity, I think it is unlikely that I lost any data as a result of the malfunction. As well, when conducting all of the other interviews I also kept 'jot notes' so it was an easy transition to move to taking more detailed notes for the rest of this interview. In making the insightful comment that "No data are untouched by the researcher's hands"<sup>685</sup> Silverman comments on the fact that the use of recording equipment within an interview and the review and signing of documents relative to meeting standard ethical requirements for informed consent can distort the naturalness of the conversation.<sup>686</sup> I agree that this impact can be had when interviews are being conducted in some fieldwork situations. However, in this research project all of the interviewees were accustomed to the use of recording equipment and were completely comfortable with its use in this context as well as being fully acquainted with the rationale for the ethical requirements underlying informed consent. As these interviews were scheduled precisely for the purpose of soliciting practitioners' opinions on various topics I have the impression the review of and signing of consent forms was a beneficial addition to the process. Specifically, the emphasis placed on informed consent contributed to establishing a comfortable atmosphere as the confidentiality of the identities of those who wished to

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<sup>685</sup> David Silverman, *A Very Short, Fairly Interesting and Reasonably Cheap Book About Qualitative Research*, (London: SAGE Publications Ltd., 2007) at 55.

<sup>686</sup> *Ibid.*



remain anonymous was clearly established. In addition, I had the impression that the audio recording as well as the signing of consent forms added to the gravitas of the occasion rather than having any negative impact.

In contrast, while being aware of the positive influences noted above, I was also concerned about the possibility of contaminating the data due to awkwardness or over familiarity as a result of being known to some of the interviewees, in that we are all members of the Ombuds community in Canada. For example, prior to beginning the interviews, I wondered if some interviewees would speak about the principles under scrutiny in such a fashion that they presented the best possible face or an idealized version. However, it was evident to me in the first interview and every one thereafter that the interviewees spoke candidly and without hesitation. It was also my assessment based on the manner in which my questions were answered and the comments made that none of the interviewees I knew beforehand felt any compulsion to answer my queries or talk about the issues under review in a particular way. I have come to this conclusion on the basis of the degree of confidence exhibited by each interviewee and the strength, idiosyncrasy and thoughtfulness of their opinions. Their style of speaking also demonstrated to me that none of the interviewees felt any need to curb or embellish their commentary in any way, shape or form. In addition, a number of interviewees provided me with documents they had written for perusal at a later date that suggested to me they had no concern about positing and debating their points of view in writing as well. Some interviewees also referred me to articles they thought would be valuable given my research interests. Interestingly enough, one interviewee took the time to prepare a chart to reflect his perspectives on the principles under review and provided that to me as part of the interview. Ultimately, I agree with Silverman that it is impossible to collect data that is so pure that it has not been influenced in any way, shape or form by the

collector or the methodology used. In this instance I would argue the methodological influences had no obvious deleterious effect as the data collected are both robust and useful.

Another aim of the use of grounded theory methods is to create a comfortable atmosphere whereby the researcher and the interviewee share 'the power'.<sup>687</sup> In this regard the fact that I knew half of the interviewees was beneficial as the interviews in many instances were akin to a conversation rather than a formal question and answer format. Also, as the transcripts were so lengthy and the interviews were conducted over a six-month period and I had organized the transcripts in a non-identifying way I was not conscious of 'who said what' about particular topics when I was ferreting out themes and coding the data. In fact, I found on a number of occasions when I was writing up the results and I would go back to the transcript to verify the accuracy of the 'in vivo' quotation I would note that when I had been thinking that it was a particular interviewee whose quotation I was citing, it was in fact a different interviewee. While I can not guarantee that my prior professional relationships did not have a negative effect and I am aware that there is a possibility that there may be have been some influencing factors of which I am unaware, I think it is worthwhile to keep in mind that the interviewees demonstrated no discomfort and spoke with a high degree of confidence and directness. It also worth noting that as I did not enter the interviews with a clearly defined hypothesis and I had not talked about the principles of independence and impartiality with any of the interviewees I knew beforehand, I think it's unlikely that they had any preconceived notions about what I would think would be the *right* way to respond to my queries.

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<sup>687</sup> Birks & Mills, *supra* note 12 at 57.

However, a potential area of contamination emerged as I was analyzing and writing up my results. As I am aware from the research findings on judicial decision-making that the impact of gender can be significant with respect to outcome I was interested in looking at whether I would see any differences between how men and women interpreted the principles under review and whether they would use different language in their descriptions. I anticipated that men and women would see these concepts differently and the data demonstrates in some areas that they did. However, I was surprised and then chastened when I realized that my own bias had initially lead to an erroneous preliminary conclusion. Specifically, as a result of my first round of analysis I concluded that many of the women interviewees believed it was very hard to be impartial and that none of the men had come to a similar conclusion about how difficult it was to maintain the degree of diligence required. I actually wrote up the analysis this way and was seeking advice on whether it was proper for me to comment on the gender difference I had observed given I only had ten women and ten men in my sample. However, in preparation for these discussions and through another review of my notes and transcripts, I realized that some men had also talked about how difficult it was to be impartial and to recognize their triggers and manage their biases. I believe I came to this incorrect preliminary conclusion as I expected there to be a notable difference. Also, I was thrown off somewhat by the fact that the interviewees who are men and voiced this opinion didn't speak about the difficulty of being impartial in the same way and at the same juncture of the interview as women. Rather, these men who discussed the challenges they experienced in this area did so throughout their commentary whereas the women who thought it was difficult made this kind of comment more emphatically at the beginning of various passages. Upon reflection, it is apparent to me that this preliminary error was

based on the strength of my expectation that ultimately proved to be incorrect with this group of interviewees.

#### Attribution of Quotations

In the letter of request for an interview I offered each recipient the option of having any of their approved comments that were quoted in the dissertation to be identified by name or to have them presented in an anonymous manner. Each interviewee indicated which approach they wanted to take at the beginning and at the end of the interview. As it became clear when I began writing up the results of the research that the flow of the paper was negatively affected by identifying the source of some comments and not others, as the majority of the interviewees requested anonymity, I consulted with experienced qualitative researchers to determine how best to proceed. As a result of that consultation, I wrote to each of the eight interviewees who had agreed to be identified by name and detailed the problem I had encountered when writing up my results and explained that my plan was to present all of the interviewees' commentary anonymously for my dissertation. I also explained that my intent was also to write articles that would be informed by these data and at that point I would contact them again to obtain their permission to quote them. The majority of the interviewees contacted me immediately to acknowledge receipt of the information and express support for the completion of the dissertation in a timely way. At this point I devised a system whereby I identified each interviewee by a letter of the alphabet, which included avoiding assigning alphabetical letters to interviewees that matched either their first or last name, and the letter assigned, (e.g. Interviewee Q), is cited in the footnotes for each verbatim quotation.

#### Volume and Handling of Data

Approximately 50 hours of time was dedicated to conducting 20 interviews which generated 391 single spaced pages of text when transcribed. Initially, I attempted to

transcribe the audio recordings into Microsoft Word documents myself. As the amount of time involved in transcribing one interview was astronomical, I contacted a professional typist skilled in audio transcription who was recommended to me by a friend and an Osgoode colleague due to her positive experience with the typist's speed and accuracy. This individual transcribed each interview into Microsoft Word documents on the basis of a very reasonable hourly rate. In order to protect the confidentiality of the commentary, the typist did not know the names of the interviewees or the positions they occupied. However, as some of the commentary easily identified the role and/or the geographical location of the interviewee, I arranged for the typist to verbally affirm her commitment to keep all information heard and identities that emerged in confidence as well as for the signing of a confidentiality agreement.

The data have been secured in the following manner: Transcripts in hard copy format are stored in a locked filing cabinet in my home office. Similarly, soft copies of the transcripts and the audio recordings are stored on USB keys and CDs and also kept in the same locked filing cabinet. All of the foregoing materials are also stored on an external hard drive that is pass-word protected and kept in a locked filing cabinet when it is not under my direct supervision. I also set up individual hard copy files to keep track of the written materials some interviewees provided to me at the beginning or conclusion of the interviews.

### Method used for Data Analysis

The generation of grounded theory as defined by Glaser and Strauss is ecological and incremental<sup>688</sup> rather than linear in its development and is interpreted by Marshall and Rossman as such in this fashion:

Theory, data generation and data analysis are developed simultaneously in a dialectical process. If you are developing theory in this way, you will devise a method of moving back and forth between data analysis and the process of explanation or theory construction.<sup>689</sup>

Therefore, as is the expectation when conducting this form of qualitative research, after each interview was completed I listened to the audio recording and made notes about and wrote memos<sup>690</sup> detailing my impressions of various aspects of the commentary, (e.g. comments that were surprising; provocative; particularly thoughtful or insightful; humorous); and/or which challenged the status quo or traditional beliefs in some way or as the interviews progressed, occupied a true outlier status. In addition, as a result of this activity, as the interviews continued I changed the wording of the questions, in some instances, so that they would flow more easily given how the previous interviews had unfolded. As the transcripts were prepared I read them while listening to the audio recording and ensured the transcript was accurate. Following that review I re-read the transcripts and underlined what I considered to be key concepts and terms, at the time. When I completed the twentieth interview and began to prepare for more in-depth data analysis I listened to each audio recording again while re-reading the transcripts. I found the exercise of listening to the interviewee's voice well after the face-to-face interview had taken place valuable as it helped me situate myself, to the extent, that it is possible to do

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<sup>688</sup> Glaser and Strauss, *supra* note 10.

<sup>689</sup> Mason, *supra* note 8 at 141.

<sup>690</sup> Birks & Mills, *supra* note 12 at 10. Birks and Mills emphasize the importance of recording the researcher's thinking via the act of writing memos as the study progresses.

so, within the original conversation so as to better appreciate the nuances in tone and delivery and emphases placed on particular topics or comments.

#### Application of Open Coding Method

In order to analyze the data in a systematic manner for the generation of grounded theory, I followed the regimen established for 'open coding' as articulated by Strauss and Corbin. The process of open coding is designed to break up the data in order to find categories and themes. The purpose of this technique is to allow for the making of comparisons that assist the researcher to move beyond assumptions and acquire new insights by using both personal and professional knowledge in conjunction with the scholarly literature.<sup>691</sup>

Through the coding process, I identified general concepts and then I labelled them. At that point I grouped the concepts into categories and looked for recurring specific commentary for each category. I compared the ideas and points of view in each category and looked for common themes and outliers. I also made note of *in vivo* codes, that is, specific phrases and words, which I found memorable, appealing, popular or unusual. For certain categories that related to how interviewees described how they actually performed an action I looked for examples of frequency, intensity and duration.

In order to cope with the volume of work associated with the coding process which was very time consuming, monotonous and demanded intense concentration, I used the 'Flip-Flop Technique' <sup>692</sup> whereby I turned various concepts and interpretations of particular phenomenon around and tried to think of what the opposite point of view would be and if this opposing point of view had been expressed by another interviewee, I looked

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<sup>691</sup> Anselm Strauss & Juliet Corbin. *Basics of Qualitative Research Grounded Theory Procedures and Techniques* (Newbury Park, California: Sage Publications Inc. 1990) at 62.

<sup>692</sup> *Ibid.* at 84.

at how it had been expressed. In comparing the categories, I did what is referred to as a 'close-in' comparison<sup>693</sup> to get beyond the usual or the obvious to ferret out all of the ways in which an idea or action or principle could be interpreted so as to move beyond description to analysis. The 'close-in' comparison was followed by the 'far-out' comparison which I did primarily at the beginning of the analysis when I was identifying all of the parameters for the 'why and how' of the interviewee's interpretations.<sup>694</sup>

In order to make sure I was aware of extreme points of view, I made use of the 'Waving the Red Flag'<sup>695</sup> technique which is designed to sensitize the researcher to particular words and phrases that suggest a closer look is needed. The type of words I used as red flags were: 'always', 'never', 'obviously', 'the only way to...', 'perfect', 'wrong', 'maybe it's just me but', etc.

These techniques assisted me to delve deeply into the meanings of the words and phrases used by the interviewees so that I could come up with a wide variety of possible interpretations. As all of the interviewees were extremely articulate and had thought deeply about many of the issues under discussion as a result of their commitment to reflective practice and/or through their training or education, the essence of the issues from their individual perspectives was readily evident.

I also used the technique of 'making metaphors'<sup>696</sup> as a device for reducing the data and as observed by Huberman and Miles "...they have an immense and central place in the development of theory".<sup>697</sup> Interestingly enough, the interviewees themselves occasionally made use of the same metaphors, (e.g. 'the proof is in the pudding') and I

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<sup>693</sup> *Ibid.* at 88.

<sup>694</sup> *Ibid.* at 90.

<sup>695</sup> *Ibid.* at 92.

<sup>696</sup> Miles & Huberman, *supra* note 14 at 250.

<sup>697</sup> *Ibid.*



examined these phrases closely to determine why these concepts or assertions resonated with me (or not) and if they had been used to describe the same abstraction from interviewee to interviewee.

Finally, I looked very carefully at outlier comments and examples of 'negative instances'. Contrary to Huberman and Miles' experience that researchers are inclined to try to ignore them or discount them when they are actually very valuable data,<sup>698</sup> I found them particularly instructive as the new view or minority opinion assisted me to look much more carefully at the majority opinion and how it came to be, (e.g. reflective of type of training or mentoring undergone; dominant historical view, etc.) and to test the validity of my own assumptions.

### Gender

In constructing my questions I followed the lead provided by Susan Speer who works from a feminist methodological perspective who said:

Likewise, if one wants to analyse interview talk where participants are asked to comment on gender issues in order to discover how people do gender as a matter of course, then such prompted 'gender commentary' may seem contrived, and thus not the best data for our present purposes.<sup>699</sup>

As a result, I deliberately did not ask interviewees if they thought gender had an impact on how their perceptions evolved or the actions they take, or others take, as they relate to independence, impartiality and fairness or if they believed gender had any impact on the perceptions of complainants and respondents. As I did not introduce the issue of gender it is instructive that a number of women raised the issue of gender in their commentaries which informed my analysis considerably.

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<sup>698</sup> *Ibid.* at 268.

<sup>699</sup> Susan A. Speer, 'Natural' and 'contrived' data: a sustainable distinction? (2002) *Discourse Studies* 2002 at 520.

I also made use of Speer's instruction in relation to how the analysis of conversation, and in this case, interviews could benefit from the use of a feminist research methodology. For instance, she provided examples of strategies that had been recommended by feminists from a methodological perspective for use as prompts such as audio and video clips, strategies for story completion, photographs, etc.<sup>700</sup> As I didn't think this kind of artifact was appropriate within this particular interview process, I used a modified version of this approach. Early on in the interview I made reference to and asked for the interviewee's reaction to the judicially stated belief that "Independence is in short a guarantee of impartiality".<sup>701</sup> I found this was a very useful prompt as it generated a great deal of animated discussion. However, I used the same strategy as a prompt by introducing briefly the research findings with respect to the influence on judicial decision-making of political affiliation and in some cases, gender and asked if the interviewee thought there was the potential for Ombuds to be influenced similarly. Unfortunately, this prompt was not very useful as some of the interviewees thought I was suggesting that Ombuds and judges fulfilled similar roles or had similar responsibilities and/or engaged in discussion about how the appointment processes differed for Ombuds and judges. As a result, that particular prompt was not very helpful in many of the interviews.

The theories that have emerged from this analysis are presented under the three headings of impartiality, independence and the connection of independence and impartiality to the perception of fairness for complainants and respondents. In addition, through this analysis I have identified a number of strategies used by Ombuds for

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<sup>700</sup> Susan Speer, "What can conversation analysis contribute to feminist methodology? Putting reflexivity into practice" (2002) *Discourse and Society* 3(6) 780 at 786.

<sup>701</sup> *Régie*, note 335 at 106.

overcoming bias, reducing partiality and for contributing to independence. These data also inform the overarching theories presented in my conclusion.

## **Chapter 5: Findings and Discussion**

### **Examination of Ombuds' Perceptions of Impartiality and Independence**

The central question under investigation is whether the principles of impartiality and independence are achievable, aspirational or impossible to attain. I place specific emphasis on the question of their viability, as they relate to the role of Ombuds in Canada. This query is informed initially by the interviewees' perspectives on how these traditional characteristics which are frequently identified as seminal to fairness, are defined and how they apply to those occupying Ombuds roles. Following the analysis of the interviewees' perspectives on impartiality and independence, I examine the strategies used by the interviewees to contribute to what they perceived to be the most appropriate expression of impartiality and independence. This is explored specific to Ombuds roles and I would argue what has become apparent is also applicable to adjudicative and ADR roles on a more general basis. The findings that have emerged from this analysis are that informants were largely of the view that while impartiality is neither achievable nor impossible, it is reasonable to aspire to be as impartial as possible based on ongoing introspection, and concerted intellectual and studied behavioural effort. The additional theoretical vector that has emerged from the data is that an Ombuds' (or other third party's) demonstration of the highest degree of impartiality has much greater impact on parties' perceptions of fairness than the degree of structural independence imbedded in or ascribed to the role by statute, policy or terms of reference.

### Analysis of the Construct of Impartiality

The interviewees' conceptions of the principle of impartiality fell into three categories: impartiality as an observable behaviour; impartiality as an unobservable or invisible cognitive and intellectual exercise; and impartiality as a combination of behaviour and intellectual effort such that the outcome of the internal machinations was readily observable through specific, considered actions and commentary. Broadly stated, the exercise of impartiality in some interviewees' minds was clearly evident through their daily activities and the use of specific processes, while others' definitions of impartiality were described as internal, intellectual exercises which were evident only to themselves and finally, some interviewees believed that while impartiality was internally driven, it was readily discernable from specific actions or behaviours. The categories that emerged from the analysis of impartiality as an observable behaviour are presented first and the category of impartiality as an intellectual exercise is presented second. Behavioural demonstrations of impartiality flow from the following examples:

#### A: Impartiality as an Observable Behaviour

In identifying impartiality as a behaviour, it was characterized by some interviewees as being concrete and recognizable in how they interacted with complainants and respondents. A comment such as "...how we speak to people... what we do everyday"<sup>702</sup> is illustrative of this point of view. It is worthy of note that very frequent reference to 'not taking sides' was made by many interviewees through comments like "...Making sure that we do not take sides in any way, shape, form"<sup>703</sup> or "We are not here to represent them nor do we represent the organization".<sup>704</sup> One interviewee noted that

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<sup>702</sup> Interviewee Q.

<sup>703</sup> Interviewee K.

<sup>704</sup> Interviewee Q.

credibility as well as impartiality comes from not being aligned with either side. Another interviewee took a slightly different approach with respect to the use of the 'sides' metaphor and described the function itself as being an unaligned role and therefore impartial. This ideation of the role follows in the tradition of the International Ombudsman Association (IOA) terminology of the Ombuds as a 'designated neutral'.<sup>705</sup>

#### A(i) Academic Preparation and Professional Experience

A contributing factor discussed in detail and at length by two very experienced interviewees was the importance of recognizing how critical professional and academic backgrounds are to how Ombuds behave and the resultant impact of their interactions with others. For instance, both of these interviewees noted how individuals who had a legal background were profoundly influenced in how they performed with respect to their capacity for impartiality, either positively or negatively, depending on the values of the interviewee, by their academic preparation and their practical experience in the legal field. This particular area of expertise was singled out as these interviewees had observed, by comparison, how colleagues who were trained in a wide variety of different disciplines, (e.g. engineering, health care, social work, as well as all manner of arts and science academic disciplines), conducted themselves differently. One interviewee's assessment was that the initial training and years of practice in a particular field had a strong impact on some aspects of what many deemed as the foundation of impartiality, that being, the capacity to establish rapport and communicate in an encouraging fashion so as to acquire all of the relevant information.<sup>706</sup> This observation of the import of academic preparation and/or work experience on the behaviour of individuals deserves considerable

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<sup>705</sup> "What is an organizational Ombudsman" online: International Ombudsman Association <<http://www.ombudsassociation.org>>.

<sup>706</sup> At this juncture an intellectual component was also noted that being the capacity to entertain various points of view simultaneously.

examination. Many advertisements for Ombuds roles ask for specific types of academic preparation and professional experience such as Alternative Dispute Resolution (ADR), social work and/or law. Presumably, it would be useful to determine if all or any of these backgrounds can be relied on to recruit individuals who attempt to think in an impartial manner. Alternatively, it would be equally useful to determine if particular academic and professional backgrounds are actually an impediment or stumbling block to developing the skills that best support the pursuit of impartiality. For instance, in looking at the seven individuals who have occupied the role of the Ontario Ombudsman (as a permanent appointee) since its inception, five were trained as lawyers (two were also judges) and one was a university professor specializing in human rights.<sup>707</sup> Therefore, would it be reasonable to say that law is the best background for this type of role as it has been the dominant mode for this jurisdiction or has it simply become a tradition to appoint a lawyer without such a choice being necessarily predicated on such evidence as 'observable' behaviours? Or, alternatively, were the individuals chosen more reflective of the backgrounds of those who are most interested in this kind of role and therefore, after the requirement to compete for the position was put into place in 1998, most likely to apply for the position?

In stark contrast, the Ombudsman for Alberta has been drawn from the ranks of the Royal Canadian Mounted Police (RCMP) and other police forces for six of the eight appointees.<sup>708</sup> Again, one wonders whether this trend is based on tradition or on

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<sup>707</sup> The Ontario Ombudsman role has been occupied by the following individuals from 1975 to the present date: Arthur Maloney (lawyer); Justice Donald Moran; Dr. Daniel Hill (sociologist); Roberta Jamieson (lawyer); Justice Clare Lewis; André Marin (lawyer).

<sup>708</sup> Lorna Stefanick, "Following Responsibility in an Era of Outsourcing" in *Provincial and Territorial Ombudsman Offices in Ontario*, Stewart Hyson, ed., (Toronto: University of Toronto Press, 2009) 27 at 31. In 2009, there had been seven appointees. As of 2011, there are eight appointees with the most recent appointment being a former Royal Canadian Mounted Police (RCMP) officer, Mr. Peter Hourihan who prior to being appointed was the commanding officer for the RCMP for the province of British Columbia. "Meet the Alberta Ombudsman", Alberta Ombudsman Focused on Fairness online: <<http://www.ombudsman.ab.ca>>.

expectations for particular kinds of behaviour related to the expression of impartiality and the demonstration of independence. Without further exploration it is impossible to know whether lawyers or police officers or alternatively, journalists, nurses, counsellors or educators are best prepared with respect to capacity for investigative rigour and the type of communication skills required for the proper execution of this kind of role. Or, it may be reasonable to question if academic preparation and professional training and experience are irrelevant as it may be contended that it is the self-awareness and self-discipline of the individual that occupies the role that determines the capacity to act as impartially as possible and to maintain an independent office. To date, we have no empirical studies to draw from in order to determine how best to prepare for a role of this nature. Given how influential those who occupy Ombuds roles can be, and the volume of resources dedicated to these roles and how important it is that these roles be implemented properly, this is a very fruitful area for future investigation. In addition, as many Ombuds rely on staff to conduct investigations and engage in various forms of ADR, the type of preparation that is most advantageous to success in these roles is also worth exploring. In my own experience, the most capable<sup>709</sup> Ombuds' investigators came from liberal studies, public administration, nursing and science backgrounds. As a result, given the multiplicity of possibilities evident, one again has to query whether it is preparation in a particular academic discipline that matters most with respect to the behavioural aspects of the pursuit of impartiality or in the final analysis, perhaps it is ultimately the combination of personal characteristics and professional experience and academic studies that contributes to the ideal candidate for Ombuds' roles. Unfortunately, to date there are no

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<sup>709</sup> The criteria I am using to define 'capable' include the ability to build rapport and establish credibility with complainants and respondents so as to engage in early resolution activities; the ability to plan an investigation and collect information properly and expeditiously; to analyze the data collected thoroughly and accurately; and prepare accurate and easily understood written investigative reports.



data to draw on to respond to this query, as in my experience, preferences for particular kinds of training, education or previous work experience has been solely based on tradition, the beliefs of the hiring committee or in the case of Ombuds staff, the current appointee's preferences.

#### A (ii) Complaint Handling Policies, Guidelines and Methodologies

Another behavioural means suggested for contributing to or creating impartiality and perhaps, more accurately, preventing partiality or reducing bias, was the emphasis placed on the importance of the articulation of and use of policies, guidelines and methodologies for ensuring the investigation of complaints was undertaken in an objective or unbiased manner. One interviewee observed that

...but impartiality you know is not a function of the person only. It is a function of rules that are established, values, and also I would say, tools in the management of the investigations...Because it is very easy to adopt some bias in an investigation. You may become more sympathetic or influenced toward a person. You may be influenced by different factors that should not influence you...<sup>710</sup>

This interviewee's conclusion was that the tools used and the guidelines followed in conducting investigations were key contributors to impartiality. This belief is comparable to that expressed by Justice Huddart whereby she argued for the importance of the publication and use of guidelines for how reviews will be conducted and decisions arrived at by administrative tribunals to contribute to impartiality.<sup>711</sup> This belief is also similar to that promoted by William Lucy, who has posited the feasibility of 'procedural impartiality'<sup>712</sup> which he defined as all parties involved being well informed about the role and the processes that will be followed which include the opportunity to be heard and reply to what others have said about the matter being reviewed. Another interviewee spoke in a similar

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<sup>710</sup> Interviewee C.

<sup>711</sup> Huddart, *supra* note 334 at 158.

<sup>712</sup> Lucy, *supra* note 630 at 24.

manner but predicated the notion of an impartial approach to investigation on beginning from an objective stand point and then proceeding by "...assessing all sources of available evidence and making your findings based on the sufficiency or the reliability or the relevance of the information that you have gathered".<sup>713</sup> The importance and necessity of such an approach may be considered to be obvious and some might describe as 'textbook'; however, the majority of the individuals who espoused this belief, that is, the certainty that a fair and carefully constructed process would provide for impartiality, did not express any caveat to acknowledge the very real possibility that the manner in which evidence is collected and the functions of assessing the sufficiency, reliability and relevance of information gathered could also be influenced by personal biases which are unknown to the investigator or the Ombuds and which could interfere with their capacity to operate on an impartial basis. Similarly, no acknowledgement was made of the possibility of structural biases inherent in various review processes which reflect the experience and/or values and beliefs of those who created them, (e.g. in-depth knowledge of bureaucratic process; high levels of literacy and numeracy; sufficient time to make various applications or sufficient financial resources to hire experts to do so on their behalf, a sense of their own culture's superiority to others, etc.). As a result, those whose life experiences are different than those who created the review procedures may not share the same definitions of sufficiency, reliability or relevance as those who are making assessments of the quality of their complaint or response. For example, an individual who is not familiar with standard administrative process when being interviewed by an Ombuds investigator, may not provide all of the information that is actually relevant, which may then have a negative impact on the credibility ascribed to his complaint, as unless he is asked a

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<sup>713</sup> Interviewee Y.

specific question he wouldn't know that this additional information should have been provided to support his contention. Whereas a complainant who is very familiar with bureaucratic process may provide many more details, comparatively speaking, using a larger vocabulary, that results in a different and perhaps more advantageous or credible appearance even though the actual nature of the two complainants' dispute with the respondent is identical. As a result, I am sceptical of the notion that the use of rigorous investigative processes contribute to impartiality on a behavioural basis due to their scrupulous application as it should now be readily evident that all processes (whether investigative or decision-making) must constantly be assessed by individuals from diverse backgrounds for evidence of bias in their construction. It would be a useful exercise for Ombuds themselves to attempt to determine if their own processes have been organized in such a fashion so as to be biased, whether intentionally or not, in favour of those who occupy a particular social location with respect to culture, socio-economic class, gender, level of formal educational, languages spoken, age, etc.

In contrast to the foregoing examples of impartiality conceived as behavioural in nature, a number of themes emerged with respect to the notion of impartiality as an intellectual undertaking and they are explored here.

#### B: IMPARTIALITY AS AN INTELLECTUAL EXERCISE

Not surprisingly, all interviewees spoke to their belief that everyone is influenced by their past life experience and the resultant biases influence how they react to and view the concerns, complaints and disputes that are brought to their attention. Specifically, one interviewee with lengthy experience in an Ombuds setting as well as in other inquisitorial roles said:

I think impartiality is an extremely rare beast because I think we can as an Ombudsperson, one can strive to be as impartial as possible but there are going to

be certain elements, certain internal biases that will affect that Ombuds' ability to be as independent and as impartial as he or she possibly can.<sup>714</sup>

#### B (i) Recognition and Management of Bias

As part of the generally held recognition that past life experiences and personal biases, recognized and unrecognized, would always be influential in how the interviewees responded to complainants and respondents, making the effort to be aware of 'our triggers' as well as learning how to better manage our reactions was identified as being an extremely important intellectual approach to attempt to overcome bias. Similarly, terminology like "...a certain flexibility to look beyond, think outside the box, go beyond the standard parameters of a certain issue"<sup>715</sup> was also used to underline the importance of having the capacity to be open to a wide variety of possible interpretations of the same subject matter. Others emphasized the importance of open mindedness generally and "...no conflict of interest intellectual or otherwise..."<sup>716</sup> for the foundation of impartiality.

#### B (ii) Flexibility and Open-Mindedness

A number of interviewees spoke to the importance of having the flexibility of mind that provided for the ability to recognize the authenticity of the very different perceptions that complainants and respondents could have about a seemingly straightforward scenario. One interviewee articulated his intellectual approach by way of the following analogy:

I guess impartiality starts with a recognition that it doesn't matter how thin you make the pancakes, there are two sides. You can't take the complaint at face value, nor can you take a response to the complaint at face value, that you know people will have different perceptions of the same thing.<sup>717</sup>

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<sup>714</sup> Interviewee T.

<sup>715</sup> Interviewee M.

<sup>716</sup> Interviewee K.

<sup>717</sup> Interviewee M.

The use of this explanatory device is very useful in that it can be used to move beyond the importance of recognizing the possibility of two individuals, the complainant and the respondent, *perceiving* the same situation very differently to recognizing that some parties may also *experience* what appears to a third party to be the same situation, very differently. The pancake metaphor was used to demonstrate that the one side of the pancake that is burnt may be obscured by the one that is cooked to perfection, or vice versa. The analogy put forward by the interviewee is representative of a more widely held point of view that posits that the intellectual capacity to be able to entertain and appreciate the validity of various and opposing points of view *simultaneously* is crucial to impartiality and is essentially an intellectual pursuit.

#### B (iii) Vigilance

There was a striking addition to many of the interviewees' commentary on impartiality and that is the degree of difficulty and watchfulness inherent in striving for impartiality from an intellectual perspective. For example, a number of interviewees spoke to impartiality as being predicated on the need for "constant vigilance"<sup>718</sup>; "a bit of a struggle"<sup>719</sup>; "...always a struggle..."<sup>720</sup>; "constantly reminding myself of potential for bias"<sup>721</sup>; "always at the top of my mind"<sup>722</sup>; "constantly questioning your own applications of those principles"<sup>723</sup>; and "the best possible due diligence [to prevent biased thinking]"<sup>724</sup>. These kinds of comments were made either at the beginning of the interviewee's definition of impartiality or were made as they expanded upon their definitions of impartiality and

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<sup>718</sup> Interviewee D.

<sup>719</sup> Interviewee I.

<sup>720</sup> Interviewee O.

<sup>721</sup> Interviewee T.

<sup>722</sup> Interviewee H.

<sup>723</sup> Interviewee B.

<sup>724</sup> Interviewee D.

were made, for the most part, emphatically rather than casually in order to demonstrate both how important and how difficult it was from their perspective to think impartially.

In addition to the notion of impartiality as either a behavioural expression or an intellectual undertaking, a third option was identified which incorporated both intellectual effort and specific behaviours. This conception is explored here.

#### C: IMPARTIALITY AS BOTH BEHAVIOURAL AND INTELLECTUAL ACTIVITY

One interviewee demonstrated the intellectual and the behavioural components of impartiality as melded together by providing the following description: "Reflective; being present; self-aware; being aware of body as well as voice, intonation and so on".<sup>725</sup> For those who held this view, some stated explicitly and some more obliquely, the importance they attributed to first thinking and then acting in such a fashion so as to demonstrate their impartiality. In a similar vein, another interviewee said "a well honed sense of empathy"<sup>726</sup> was critical to impartiality and an empathetic approach was mentioned less emphatically but tangentially by others. As an empathetic approach requires the intellectual flexibility to imagine and to try to understand what another party has experienced in conjunction with having the behavioural and communication skills to demonstrate these capacities in their interactions with individuals, the ability to do so successfully is indicative of both intellectual and behavioural effort. This kind of commentary is reflective of what I would posit is the ideal with respect to the pursuit of impartiality in that it recognizes that cognitive capacity and intellectual effort are required along with considerable attention being paid to comportment with respect to body and spoken language and the behaviours exhibited in particular situations.

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<sup>725</sup> Interviewee P.

<sup>726</sup> Interviewee A.

## THE VIABILITY OF IMPARTIALITY

With respect to the viability of the concept of impartiality, the research results demonstrate that the majority of the twenty Ombuds and staff interviewees' views coalesced around the belief that impartiality is clearly not achievable but rather is aspirational in nature. The level of success that a practitioner achieves is dependent on the degree of self-awareness, the rigour of his or her self-discipline and reflective capacity as well as a strong commitment to ongoing self-development. However, interestingly enough, one interviewee's self-assessment was that of never having any instance of partiality or bias for or against anyone or an issue in her current role. Her explanation for this achievement was that due to extensive training and experience in roles that also required impartiality, this characteristic had now been thoroughly integrated into the thinking and behaviour essential to the impartial implementation of the current Ombuds role. This comment is reminiscent of the assessment made by Kenneth Cloke who identified those (in his experience, judges) who think they are unbiased are likely to be biased.<sup>727</sup> It is interesting to see the contrast between the interviewee's comment cited earlier who was also very experienced who had come to the opposite conclusion in which impartiality was described as a 'rare beast'.<sup>728</sup>

Another vector was added to the discussion and emphatically articulated by another interviewee who stated in complete opposition to the notion of 'complete or perfect impartiality' that not only was impartiality impossible to achieve, it should not be vaunted as a desirable quality. Her view was that being impartial meant not caring about the outcome of a dispute. She saw this type of indifference as being highly undesirable as her view was that this kind of perspective can only be created by a high level of

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<sup>727</sup> Cloke, *supra* note 599.

<sup>728</sup> Interviewee T.

detachment.<sup>729</sup> In contrast, it is worthy of note that another interviewee specifically indicated that it was helpful to describe to complainants that the approach taken in handling complaints as being impartial by stating that “we do not have a vested interest in the outcome, personally”.<sup>730</sup> The interviewee who saw the desire to be detached and separate as largely a white, male construct observed that while such an orientation was highly valued in society, she had concluded that such a view did not actually contribute to fairness. Rather, she promoted the importance of partiality by these words:

The more, the more partial you are to as many people as possible then the more informed your opinion can be. So as opposed to try to remove yourself, I would say you try to involve yourself with as much as possible and to see both the limitations and advantages of many different perspectives.<sup>731</sup>

This interviewee also emphasized the importance of attempting to understand the motivations and rationales for various behaviours. This approach is akin to what has been identified by Lorne Sossin in his prescription for how impartiality can be pursued by a decision-maker who is deciding on claims and benefits by encouraging that information be exchanged openly in a respectful, empathic way so as to increase mutual understanding.<sup>732</sup> This interviewee also took considerable pains to distinguish ‘empathy’ from ‘agreement’ in that she clarified that empathy simply meant trying to appreciate what others were going through rather than agreeing with their statements or behaviour or believing that you could experience situations in the same manner as they did. In the

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<sup>729</sup> This commentary has had an important influence on my own practice as in describing the role of the Ombudsperson I have typically stated that being impartial meant that I had no vested interest in a particular outcome. As a result of the insight gained from this interviewee’s comments I am no longer use that terminology as clearly an Ombuds should be heavily invested in a fair outcome. I now clarify that I do not act as a representative or advocate for either side of the dispute and that if I find that an error has been made then I will make a recommendation or propose a remedy for an outcome that is fair to all concerned.

<sup>730</sup> Interviewee Q.

<sup>731</sup> Interviewee H.

<sup>732</sup> Sossin, *supra* note 326 at 814.



course of her commentary she introduced the term of 'multi-partiality'<sup>733</sup> into the conversation to best describe what she aspired to in her interactions with others when discussing concerns and complaints. Her view was that multi-partiality was the ideal *modus operandus* for an Ombuds and could be achieved through a high degree of empathy, if defined correctly, for all concerned. It is noteworthy that this interviewee had the least amount of experience in an Ombuds role and in dispute resolution generally, of all those interviewed. While she was unaware that the expression of 'multi-partiality' had already surfaced in scholarly literature, her views are closely connected to those expressed by Sturm and Gadlin<sup>734</sup> and Christopher Moore<sup>735</sup> and their recent introduction of the term of 'multi-partiality' to the ADR discourse and is comparable to 'omni partiality', the concept of being partial to all parties simultaneously,<sup>736</sup> that was introduced by Kenneth Cloke in *Mediating Dangerously*. In addition, two other women interviewed also noted that women do make decisions differently than men in that they take different and often more information into account before arriving at a conclusion. While not expressed as multi-partiality, these two interviewees' belief that women collect more and different information than men (in these interviewees' experience) struck me as being somewhat similar to the modality of multi-partiality as expressed above. Both interviewees explained how much time they devoted to gathering as much relevant information as possible and the importance of having the self-discipline and patience to truly understand what had happened from all parties' perspectives.

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<sup>733</sup> I am taking pains to describe how the term of multi-partiality was expressed in this interview, e.g. preceded by "umm, umm, like..." as I had the impression the interviewee had not encountered the term before and was creating it as we spoke to best describe how she believed she should interact with complainants and respondents.

<sup>734</sup> Sturm and Gadlin, *supra* note 595 at 4.

<sup>735</sup> Chris Moore, *supra* note 598.

<sup>736</sup> Cloke, *supra* note 599.

Another related but differently expressed point of view was presented as “I do think there is a difference between white males of influence who previously have been the decision-makers in our society and the way in which other people might make those decisions...they will take into account different things along the way that make up who they are”.<sup>737</sup> This commentary is comparable to what was explored by Justice Wilson in ““Will Women Judges Really Make Difference?”<sup>738</sup> and was corroborated by James Stribopoulos & Moin A. Yahya’s findings.<sup>739</sup> These comments made by women who are Ombuds provide additional fodder for the possibility that men and women may approach the resolution or investigation of complaints and the analysis of evidence differently resulting in substantially different outcomes for complainants and respondents depending on who is in charge of and/or implementing the investigative or early resolution process.

Another point raised that relates to gender is one interviewee’s observation of how difficult it had been to retain staff members who are men for the Office with which she is affiliated. While this interviewee thought it was very important to have the views of both men and women on the issues being reviewed, past experience was that the retention of male staff was low. Specifically, she had observed that the men hired previously were not willing or able to maintain the degree of patience that was required to work with difficult complainants. As a result, those men who were very interested initially in the Ombuds field subsequently left to pursue other forms of employment and rarely were there any significant number of men who applied for the positions advertised.

As there are many men who work in the Ombuds field and have done so for lengthy periods of time, both as sole practitioners, heading small and large Offices and as

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<sup>737</sup> Interviewee A.

<sup>738</sup> See Bertha Wilson, “Will Women Judges Really Make a Difference?” (1990) 28 Osgoode Hall Law Journal 507.

<sup>739</sup> Stribopoulos & Yahya, *supra* note 421 at 354.

members of investigative or informal resolution teams, this interviewee's experience may be unique. However, her point of view adds to the richness of the discussion of how men and women may approach and practice within the Ombuds role quite differently, depending on the type of Ombuds role and perhaps, geographical location of the Office and/or the social location of the Ombuds staff, complainants and respondents.

### INTUITION AND IMPARTIALITY

It is noteworthy that one interviewee specifically addressed the influence of life experience and intuition in how he views impartiality in the following manner:

The first is that if we are going to try to do Ombuds work, we either have a computer or we have humans. There is no appetite among the [population being served] for that sort of computerized, mechanized view going about this type of work. We've heard a lot [at a particular conference] about the requirement and the benefit of the flexibility which an Ombudsman brings. That requires a measure of intuition. Part and parcel of human intuition is this notion of bias and the life experience we all bring to our decision-making. So I am not sure that talking about the fact that there is this evidence of a cognitive connect into decision-making in all that we know as humans we experience, really gets us very far.<sup>740</sup>

This individual was also adamant that as the body of work that he had assembled and the activities pursued in other roles prior to being retained as an Ombuds was readily available in the public domain, those who made use of the Office should rightly understand that his past experiences and well known values, would influence his approach and his views on how to properly implement the Ombuds role. In addition, other men who were interviewed as well as some women also emphasized the import of their intuition as being highly influential and valuable in how they viewed people and issues. Another interviewee spoke in a particularly evocative manner about the complexity of intellectual and emotional components associated with attempting to understand various perspectives. Specifically, she said:

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<sup>740</sup> Interviewee D.

...I need to use different senses to help me understand, so I do, I do benefit from a visual orientation, from an intuitive sense. I always trust my gut. It is not only an intellectual exercise or an exercise based on language and the manifestations of language, it is gut. What am I hearing, seeing, feeling, that helps give me a richer understanding.<sup>741</sup>

An ideal definition of the components and approach to achieving the highest degree of impartiality as is personally possible was described in the following way:

A set of process freedoms. But then, how I use those freedoms can be very biased. I may not live out the notion of impartiality and I suppose what I am using as my definition of impartiality is an open mindedness, an objectivity, a willingness to hear and understand and accept different views, or if the opposite, to reject views. To do so without preconceived notions, biases, prejudices, stereotypes, etcetera. And to be able to make an evaluation that has the purest, if we can kind of think of it that way, process and intellectualization around it. I am not sure that I achieve this all the time but in [my field] particularly, we must have a goal or a notion of optimum [effectiveness] and we are working towards that. I suppose just as in law you have the notion of absolute justice or pure fairness, or other wonderful phrases, you use those as your, your sort of sign posts in the future you are working towards. Yet the reality is that many times you must accept less than, because that is all that you can make happen.<sup>742</sup>

This kind of commentary demonstrates how differently the concept of impartiality is understood and implemented by thoughtful Ombuds practitioners in comparison to the original notion of detachment and disinterest that characterized the ideal of impartiality in the past and is still described as such in some arenas.

In deconstructing the concept of impartiality I found it ironic that one interviewee indicated that he had become more comfortable with using the term 'objective' rather than impartial as he finds it to be a better description of how he approaches situations. It was interesting that this interviewee did not attach any significance to the fact that impartiality and objectivity are used frequently as synonyms and the analysis of whether objectivity is aspirational, achievable or impossible would be virtually identical to the critique of the concept of impartiality. Rather he had concluded after extensive contemplation that

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<sup>741</sup> Interviewee P.

<sup>742</sup> Interviewee P.

'objectivity' was a better fit than 'impartiality' for what he aspired to do when approaching situations.

These data suggest that individuals who believe in impartiality (or objectivity) as a positive attribute recognize that self-awareness and monitoring of reactions is key to achieving as high a degree of impartiality as possible for them as individuals. Similarly, the manner in which one communicates and the rigour with which the complaint handling processes are implemented was also seen to be demonstrative of an impartial approach. In looking at the conclusions arrived at by some of the interviewees for the purpose of theorizing, I am proposing that impartiality is best described as a skill that individuals work at improving on a longitudinal basis. While it was recognized that some people may find it easier to become more skilled in thinking and behaving in an impartial manner than others based on personality and academic preparation and work experience, the majority do not see impartiality as an end that could be achieved in its entirety and is better understood as a 'work in progress'. As a result, I am positing the theory that an individual who is very self-aware and skilled at suppressing stereotypes and demonstrating that capacity to others through the manner in which he or she communicates, is well positioned to demonstrate a high degree of impartiality in particular situations. However, it is also evident that regardless of the high level of skill development, as identified by one interviewee in particular, situations may present themselves where the subject matter is such that the Ombud's reaction is so negative, (e.g. death of a child due to neglect or abuse), that there is no potential for looking at the situation impartially prior to making a determination, regardless of the desire to do so and the highest skill level and self-discipline. Therefore, I would contend that some individuals may demonstrate a high degree of impartiality in many situations based on their continuing attention to self-awareness, self-knowledge and

capacity to manage the impact of stereotypical responses or past experiences so as to be as open minded as is possible; whereas in other situations it is impossible for these highly skilled and evolved individuals to do so. As a result, a high degree of impartiality may in fact be situation-specific. Moreover, a number of interviewees indicated that in order to ensure a matter was reviewed properly and in an unbiased manner it was necessary to decline further involvement given the negative feelings the individual's behaviour and/or attitudes evoked. Therefore, in order to ensure that parties are treated fairly, individuals must know when they should remove themselves from a matter presented for review as their past experiences or personal values are too influential in a particular scenario.

The foregoing analysis goes far beyond the traditional notion of 'conflict of interest' where an individual recuses herself because of a potential financial benefit or a close, personal or professional relationship. In contrast, this kind of recusal or withdrawal from an interaction can only occur as a result of a high degree of self-knowledge coupled with the discipline and confidence to be able to articulate in a respectful manner why Ombuds were not able to continue their involvement with a matter given their negative reactions to particular values espoused and/or behaviours justified on the basis of those values.

Conversely, while this possibility was not raised by the interviewees, I am asserting that it would be equally important to be mindful of the possibility for partiality to emerge in the opposite scenario whereby an individual who aspires to be impartial is also able to recognize when shared values and beliefs are well developed in a complainant or a respondent. In a situation where the influence of 'positive bias' is in play the Ombuds would also require sufficient self-awareness so as to counteract the assumption that a person the Ombuds admired or with whom he had established a very comfortable rapport was telling the truth, or was more credible than the other party, without further

assessment, given the positive persona presented and the strong connection that had been created.

These data demonstrate that individuals who aspire to be as impartial as possible have to make a sustained effort to do so by developing and maintaining the capacity to recognize their biases and how to best overcome them when it is appropriate to do so. In addition, those occupying third party roles must also be able to gracefully remove themselves from the dispute resolution process when an individual's belief systems or behaviours inspire a negative or overly positive response. As a result, my research also includes inquiry into the strategies that individual Ombuds have used successfully to reduce the potential for bias and partiality in their own practices. Given the generic manner in how these strategies have been expressed by the interviewees, they are also readily applicable to other dispute resolution domains, (e.g. all manner of arbitration, mediation or inquisitorial processes or adjudicative processes) which are also predicated on an impartial approach.

The type of strategies identified can be broken down into two different categories. The majority view is the notion that individuals must be sufficiently introspective and self-critical so as to have developed the degree of self-awareness that allows them to identify and recognize their biases and the circumstances and behaviours which trigger them. This includes the capacity to develop and maintain sufficient self-discipline to thwart or overcome biased or partial responses. Interestingly enough, a minority and opposite point of view presented is: 'you are either impartial or you are not by virtue of personality'. The interviewee who expressed this point of view most strongly believed that it was not possible to teach someone to be impartial and/or essentially effect a change in personality, rather this orientation or personality characteristic had to be inherent in an individual's

make up. Initially, this point of view seemed incongruent with the degree of introspection and resultant self-awareness and ongoing skill development that others posited as being required for an approach or response which is as impartial as possible. However, as I reflected on this notion further, the comment made suggests that in order to be as impartial as it is possible for a human being to be, clearly that individual has to value impartiality and be willing to work at being impartial. Therefore, the 'dyed in the wool partisan' who does not value impartiality would likely have no interest in developing the self-awareness and discipline and concomitant communication skills which are the foundations for being willing to look at all sides of an issue and to see value in being open to understanding and accepting points of view that are different than the ones she currently holds. It is also worthy of comment that one other interviewee also talked about having the type of personality that allowed her to pull back from an automatic biased response. However, the more widely held view of the concept of a 'trained professional' which resulted from all manner of academic and work experience, years of service in roles characterized as 'impartial' underlined by constant introspection, self examination and a commitment to ongoing personal development, was the dominant view for the means for becoming as impartial as possible. Within these general parameters, the following strategies and techniques were put forward as being very effective.

#### Strategies and Techniques for Increasing Impartiality

##### 1. Checking Biases with Others

It is instructive that the specific techniques identified by all interviewees were very similar for those who worked as sole practitioners and those who worked with colleagues, with one notable exception. That being, those who worked with colleagues talked frequently about the degree to which they depended on their co-workers to challenge their



biases, whereas those who worked alone had to depend on their own capacity for self reflection and in one person's description, "my conscience".<sup>743</sup>

The style of group reflective practice where colleagues speak openly to one another and provide feedback is very similar to that espoused by Sturm and Gadlin in their analysis of how to generate systemic improvements in a science and health care setting.<sup>744</sup> The importance of being exposed to varying points of view and perspectives on people and issues is also demonstrated in the research findings of Cass Sunstein et al and Stribopoulos and Yahya on judicial decision-making. Their data verified that with benches composed of those with differing political affiliations, the impact of their political views on decisions was dampened by the presence of one judge of a different political affiliation, and in other situations, by gender.<sup>745</sup> In some instances, a discussion of the substance of the matter may have been debated in such a manner that 'bad' bias was identified and tempered or eliminated or the in-depth discussion resulted in a change of opinion. In the Ombuds setting, the value and the mechanics of the team based approach for contributing to impartiality was introduced when group discussion was used to help a colleague understand that she may be biased through comments like:

We have had some open discussions about ... and we put our own biases on the table ... We feel comfortable enough here to do that...some of us get involved in assisting in the decisions if there is a sense that someone's [bad] personal bias on a particular type of issue may unduly influence the way we should proceed.<sup>746</sup>

Individuals also highlighted the great benefit that came from talking with team members or colleagues about issues they were examining so that they could be certain that their own initial negative or positive reactions to an issue did not affect how they

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<sup>743</sup> Interviewee L.

<sup>744</sup> Sturm & Gadlin, *supra* note 595.

<sup>745</sup> Sunstein et al, *supra* note 432 at 347 and Stribopoulos and Yahya, *supra* note 421 at 347.

<sup>746</sup> Interviewee Q.

approached the handling of the complaint. Some referred to making use of regularly scheduled meetings, for instance, "...a weekly team huddle..."<sup>747</sup> where cases were discussed in detail and how helpful it was to have other views presented not only to advance more options for how to address the complaint or response but to remind them not to prejudge the legitimacy of a complaint or be influenced by a negative reaction to a complainant or respondent. One interviewee talked about how regularly scheduled coffee sessions for discussions about cases were very useful when someone was dealing with a very challenging individual to say "Here is the road map to finding out whether or not the [complainant's] concern has merit and we will look at those things. Divorce yourself from the [complainant] for a moment. We'll do the same when we deal with a pesky [respondent] as well".<sup>748</sup> In addition, taking the import of the same kind of dialogue considerably further, a number of interviewees spoke passionately about how they regularly asked their colleagues or staff to vigorously challenge them on why the approach they were proposing could be seen to be biased and wrong and/or how it could or should be improved.

Another interviewee discussed the scenario whereby he becomes aware of the impact of his bias after he has completed his review and has come to a conclusion. This reality becomes evident to him when he is in the midst of writing a letter to advise a complainant that the contentions can not be supported and he realizes he is having difficulty doing so because he can not adequately answer his own questions. At that point he recognizes the need to assess his own reactions and ask others for their input in order to do his best work. He indicated in this circumstance he comes to realize that "I need to keep an open mind; recognize that there are going to be biases. So I look for different

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<sup>747</sup> Interviewee I.

<sup>748</sup> Interviewee D.

types of individuals to be involved in decision-making; that will consider [different things].

That way you get the best product you can have".<sup>749</sup>

In the same trajectory, that is, making use of others' views to challenge your own reaction, but using a different tactic, the same interviewee spoke about how lengthy experience had taught him to look for input from those with very different backgrounds to his:

...have been doing this kind of work for a long time; has attuned me to it; best way to overcome those biases is to have divergent views; canvass everybody's opinions. If all lawyers, they could look at it the same way; [in a previous role] the beauty was that not everyone a lawyer. Some scientists, social workers, nurses, teachers. No right or wrong way. Put it out there from the beginning. You need diversity in their decision-making because people will approach problem solving in a different way.<sup>750</sup>

A similar approach to using deliberate and systematic consultation with colleagues was described by an interviewee in that he sought out input from external knowledgeable individuals, in order to check his assumptions, and prevent potential bias. One of the strategies used to seek information from well informed individuals outside of the Ombuds Office was described as:

We did a round table with [a particular group], ...., I am always willing to question my own ideas. When you're a [particular focus] you only hear from these people but when you're in this position you have access to a greater number, a wider level of sources, and you're foolish not to use them. So both to reinforce or to determine whether I was on the right track but were there other issues to examine?<sup>751</sup>

The foregoing examples demonstrate how seeking input from colleagues and external informants, when possible, was found to be very beneficial for identifying and overcoming personal bias or partiality at many stages of the complaint handling and fairness assessment process.

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<sup>749</sup> Interviewee S.

<sup>750</sup> *Ibid.*

<sup>751</sup> Interviewee G.

## 2. Systematic Procedural Approach to Contributing to Impartiality

Other interviewees also spoke to the importance of having a system in place that created conditions that contributed to an impartial approach, (e.g. establishing procedures that contributed to ensuring both sides were heard and that evidence was assessed objectively). In addition, in some offices, systems were established for auditing files after they had been closed, either by other staff or as an exercise in self-assessment, to determine whether the case had been handled as fairly as possible, with the demonstration of impartiality being a key criterion in that review or audit. The importance of being highly self-critical with respect to how the work of the Ombuds was accomplished was related to the fact that an Ombuds, by definition, is often in the position of criticizing the work of others so individuals in this role should therefore be constantly providing for or engaging in criticism of their own work. In addition, individuals who worked in offices with multiple staff talked about how advantageous it was to have programs in place to mentor new staff and to train them to demonstrate a high degree of impartiality and when to ask for assistance prior to ever having contact with those bringing forward complaints.

## 3. Focus on the Issue

The individual skills required for developing the capacity to be as impartial as possible were epitomized in comments like: "Focus on the problem. Focus on what it is your job is. It does not negate at all my own sort of personal feelings for the difficult situation they find themselves in".<sup>752</sup> This type of commentary was provided to demonstrate that while a complainant's situation may evoke great sympathy it was also possible to determine objectively if a respondent had fairly assessed whether a complainant was actually eligible for a particular service or benefit.

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<sup>752</sup> Interviewee Q.

Another example of the use of 'focus' for dealing with bias was expressed as withholding judgment on the behaviour and honing in on whether there is a valid issue to address by not allowing the complainant's behaviour to influence the assessment of the validity of the complaint. One interviewee described the process used in the following manner:

you know, irrespective of how this person acts. And so we deal with [complainants] who will call and yell at us. They're mean to you, are ignorant and they're rude and say things that.... But do they have an actual issue? And it is harder sometimes with those cases to try and find that. Yes, there is an issue here even though he is telling me I am a jerk and all those kinds of things. So there has certainly been situations...where I have dealt with people I didn't like but had to work harder to make sure that if there was an issue I still helped as best that I could.<sup>753</sup>

Another interviewee spoke about how respondents can be equally challenging by stating:

A particular [respondent] will react in a certain way which offends my sensibilities so I know and I prepare going into that that we will have to strip that down, that means taking 15 or 20 minutes of just obnoxious commentary and then say okay you got that out of your system now lets focus on the issues.<sup>754</sup>

The reality that both complainants and respondents can be challenging to the impartiality of a practitioner is acknowledged in the following commentary whereby the interviewee demonstrates the means he uses, that is, a high degree of self-awareness and knowledge, to ensure the style of the difficult person does not overcome his perception of the substance of the matter:

but to understand yourself and say you know what, this [complainant] is a bombastic .... but you know what, that [complainant] has, when all is said and done, a legitimate complaint about the fairness he or she has received from the [respondent]. A [respondent] can be closed minded, heavy handed, but at the end of the day there may be a legitimacy to their particular position with respect to that particular point.<sup>755</sup>

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<sup>753</sup> Interviewee G.

<sup>754</sup> Interviewee D.

<sup>755</sup> *Ibid.*

Another example was provided whereby it had been determined that the complainant had a valid complaint. The difficulty was that the individual's language and behaviour was so offensive (racist, sexist, etc.) it was very challenging to engage in any kind of interpersonal communication so as to move forward on the matter. In order to be able to do so, one interviewee gave the following explanation:

The individual's complaint has a lot of merit but the manner in which he presents; it really is a big turnoff: belligerent, rude, says offensive things; even if you caution him he keeps going on. I have had to hang up on him a couple of times. He hasn't threatened me but is known to be verbally abusive. At the end of the day he's got a good case. So I put all that aside; focus on the issue; limit my interactions with him; decide how much time he should receive. I will not entertain any offensive language; disparaging comments about other races, individuals. I may have to limit him to corresponding only by mail; may not be allowed to attend at the office. I maintain a professional decorum at all times...<sup>756</sup>

As is demonstrated in the commentary above, the common thread in the data that emerges from discussions about the strategies used to address bias is the high degree of self-awareness and discipline associated with recognizing the potential for negative bias based on the manner in which an individual interacts with the Ombuds or staff. As a result, emphasis was placed on focusing as exclusively as is possible on the material issues under review and the matters in dispute so as to prevent or overcome what may be a strong desire to dismiss the complaint so as to end the interaction. It is important to note that in describing these scenarios the 'style of interaction' or 'offending behaviours' can not be equated with the term of 'personality'. Rather, in this context, the values of the complainant or the respondent and the behaviours exhibited and attitudes espoused are indicative of a manner of interacting that makes it almost impossible to communicate in a productive manner.

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<sup>756</sup> Interviewee S.

#### 4. Identifying Triggers and Managing Reactions

Many interviewees spoke to the importance of recognizing behaviours and situations that triggered a potentially partial response. One interviewee identified 'abuse of power' by respondents as a key trigger for her. In order to avoid jumping to an erroneous conclusion she has adopted an approach whereby she gives respondents the 'benefit of the doubt' if they don't call back in a timely manner rather than assuming they are trying to use their position or power in order to avoid dealing with the Ombuds. This interviewee said rather than assuming the person who wasn't returning my call was behaving inappropriately I say to myself:

How would I address this in any other way? I wouldn't automatically assume because, you know, the plumber didn't answer on the first call that he was being, you know, elitist or arrogant. So. I can't assume that is the case with the .... I have to, you know, give him the same opportunity. I will call, a secondary call, and an e-mail ... You know, just know that it is there [possibly deliberately not responding to demonstrate power or to obstruct review] but just go about doing it like I would in any other situation in being fair with it.<sup>757</sup>

Another interviewee spoke about the fact that due to a great deal of time spent in reflecting on her reactions in an attempt to increase her self-awareness she is now very aware of the triggers that could overcome her desire to be impartial by saying:

at this point I know myself well enough that I can identify the cues, those circumstances or those individuals that upset my own value system, my own way of seeing things. And I cannot change my value system and I cannot seem to control the upset, but I am able to identify this is one of those circumstances.<sup>758</sup> So what I do right off the bat is engage in a very active reflective self-checking practice. If I find that there is something about the individual or the circumstances that, or me, you know, if my own fatigue factor I mean you have to be aware of it, I will stop the relation and hand it over to someone else.<sup>759</sup>

It is important to point out that prior to coming to the conclusion that she could not continue working with a complainant or respondent due to his or her offensive views or behaviour,

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<sup>757</sup> Interviewee F.

<sup>758</sup> The behaviours which elicited the interviewee's reactions were sexist, racist, ageist, etc.

<sup>759</sup> Interviewee P.

this Ombuds also indicated how much time and effort was spent in challenging the individuals on the stereotypes that were influencing their views and had resulted in the biased commentary or behaviour. In some instances, it was possible through respectful and careful dialogue to discuss the commentary and behaviour and come to an agreement such that the unacceptable behaviour would not continue so that the discussion of the matter under review could continue. The following words are indicative of steps that must be taken:

There are times when [complainants and family members] are not acting in the appropriate way and they need to be called on that behaviour. In a respectful way. There has to be many elements to that calling but one must call the behaviour and one must put an end to it. And that same thing applies to [respondents].<sup>760</sup>

It is instructive with regard to the use of this strategy that it must also be acknowledged that when it has not been possible to successfully challenge and prevent the continuation of unacceptable behaviours another individual would be asked to deal with the case to see if this type of behaviour could be managed differently so the complaint review process could be concluded successfully.

The handing over of a complaint to a colleague is an option in Ombuds Offices with large staff groups but for those who are solo practitioners, other means have to be used. A sole practitioner who identified mental health issues as being an area where she must be mindful of the potential for bias to affect her approach advised that in order to ensure she doesn't come to a premature and erroneous conclusion because of the condition of the person bringing forward the complaint, she uses a number of strategies. Specifically, she ensures she uses a consistent standard of assessment and looks very carefully at the facts presented so as to truly understand the nature of the problem before determining how to proceed. In addition, she noted that she is also careful to demonstrate

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<sup>760</sup> *Ibid.*



unequivocally when speaking with respondents that she will *not* accept a respondent's immediate conclusion that the complaint must *not* be valid because of the complainant's mental health disorder. She describes the following approach as helping her (and others involved in the discussion) to handle this kind of scenario more appropriately and in as unbiased a manner as possible:

It requires a much closer look at what you're hearing from all of the parties involved and hopefully, at least in [the sectors I have been involved in] all of the parties involved quite often come from different types of backgrounds. So you are hearing from people that bring a different perspective. Um and some of them will be farther away and some of them will be closer to what yours is, so there will be that challenge. Sort of being kept on your toes in looking at the process.<sup>761</sup>

As noted previously, the interviewees indicated that a high degree of self-awareness as to what your triggers are, for instance, disrespectful or obnoxious interpersonal interaction, racist, sexist, pro or con reactions to various religious beliefs or socio-economic class, etc., and/or various types of conditions is required. Following from this awareness is the necessity for developing and maintaining the capacity to confront offensive and unacceptable commentary and behaviours in a respectful and professional manner. In addition, the practitioner must have the reflective capacity and self-knowledge to determine if her bias is of the 'good' or 'bad' variety and if it is of the 'bad' variety, to overcome it so as to handle the complaint fairly.

#### 5. Develop a Malleable Mind

The notion of setting aside an initial reaction and making yourself think more broadly, was also used frequently as means for aspiring to be impartial. One interviewee articulated this mental activity as telling yourself to: "put that aside and be open and [then] wrapping your mind around a different opinion, to be malleable".<sup>762</sup> Another individual

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<sup>761</sup> Interviewee O.

<sup>762</sup> Interviewee F.

spoke directly to the situation whereby the Ombuds had previous contact with an individual who had brought many issues forward none of which were founded. When the same individual brought forward another issue she did the following: "So really just trying to open myself up and silence the eye roll and you know those feelings and it is like, no, open my mind. Listen to this. Look at it as if I have never heard from this person before".<sup>763</sup> She summarized this mode of thinking by describing it as having "an argument in my head"<sup>764</sup> whereby as soon as she recognizes her bias emerging she talks through her initial reaction in her head; remonstrates herself and then listens openly and carefully to the individual's concerns. Once again, both self-awareness and self-discipline are key requirements to the successful use of this technique.

#### 6. Begin from and Hone Empathy

As in the Ombuds field <sup>765</sup> (as in other complaint handling and dispute resolution arenas) it is a given that many people who bring forward complaints and those who respond to them may also behave in an angry, hostile or unreasonable manner it is not surprising that many interviewees indicated that dealing with particular types of individuals tested their impartiality. As a result, a number of interviewees spoke about their ability to empathize with individuals who approached or responded to them in a rude or arrogant manner, whether they are complainants or respondents, as being integral to their capacity to be as impartial as possible.

Examples of how Ombuds deal with this reality include comments such as: "I guess I can emphasize with ...a little bit and I try and put myself in their shoes and say

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<sup>763</sup> Interviewee I.

<sup>764</sup> *Ibid.*

<sup>765</sup> The reality of difficult, challenging or unreasonable complainants is so pervasive that the Forum of Canadian Ombudsmen (FCO) hosted multiple day-long workshops on dealing with unreasonable complainant behaviour, in six cities across Canada, in 2009, 2010 and 2012, which were filled to capacity. In fact the NSW UCC Behaviour Manual and training program which is the platform used for these workshops begins with the premise that dealing with unreasonable people is a large part of the job of an Ombuds.

look past what they are saying and what they are throwing at you, and try to imagine where this is coming from".<sup>766</sup> This desire to understand why someone is behaving in this fashion and continuing the conversation was supported by following this mantra: "Breathe deeply and dig deeply".<sup>767</sup>

A similar response to deal with obstructive, obnoxious or insulting behaviour was to "...silently say to myself he is doing the best he can with the skills he has".<sup>768</sup> In a similar vein another interviewee talked about putting more effort into getting out of his own comfortable world and trying to think about the issue as if he was in the same situation by saying "but also working harder yourself to get, to put aside your own biases, your own perceptions, your own ...[and say] what would I do if I was them".<sup>769</sup> In the course of discussions about the importance of relating to individuals empathetically, it was articulated by a number of interviewees how important it was to recognize how different, and, in my view, how much more privileged, the practitioners' circumstances are from some of the complainants that bring forward their concerns and some of the respondents who interact with them.

## 7. Effective Listening

Not surprisingly, basic components for dealing appropriately with complainants and respondents that supported the highest degree of impartiality included characteristics of good communication that would be present in any setting like: listening very carefully; taking notes; being mindful of asking relevant questions; and demonstrating real interest in each of the parties' perspectives. Another interviewee spoke about the importance of moving away from past training and work experience, that was very beneficial when

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<sup>766</sup> Interviewee M; Interviewee H.

<sup>767</sup> Interviewee M.

<sup>768</sup> Interviewee B.

<sup>769</sup> Interviewee G.

litigating, but inhibiting in an inquisitorial process and detracted from his ability to manage his biases, so he had worked on "...shutting off that part of our brain that is preparing a response while we are listening".<sup>770</sup> Another interviewee spoke to being able to compartmentalize a suspicion of being lied to, then recognize his potential for bias and to listen carefully from that point forward in order to understand the issues being presented in this way:

The other one is being aware of the little voice in my head that would say things like 'oh shut up' when someone was telling a story that I heard before and didn't feel that they were necessarily being truthful...Essentially by making a point of becoming aware of those things when there is potentially a bias or [if] I don't like someone...it's important to recognize that's the case and sort of compartmentalize that and then deal with the other issues.<sup>771</sup>

The notion of being able to recognize and then compartmentalize or seal off an unacceptable reaction or response and then move forward with a more open mind was seen to be critical to effective listening for increasing impartiality.

#### 8. Take the Time

A key element of impartiality which to date, I have not heard articulated in the same fashion for those who aspire to be impartial in other roles is the notion that the Ombuds' singular role is to review and resolve complaints and only that. As a result, by definition, the Ombuds has greater opportunity to deal appropriately not only with the complexity of the issue but also with recognizing and managing triggers so as to overcome bias. One interviewee made the following comment:

We have the time. That's what we are hired to do. To take the time to do that and part of that time taken is to be reflective and to think well, what was my initial reaction? What was my initial instinct and fight to try and put that aside and to continue looking at the issue. I think that's part of the role, is that struggle.<sup>772</sup>

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<sup>770</sup> Interviewee B.

<sup>771</sup> Interviewee J.

<sup>772</sup> Interviewee O.

This particular insight is very important in my view as it demonstrates not only that the proper implementation of the Ombuds role requires dedicated effort, it is enhanced by the fact that this is the only role fulfilled by the incumbent such that the individual is not also teaching classes; or making far reaching logistical or financial decisions for a large organization; or lobbying for different funding arrangements, etc. Another interviewee addressed this point specifically by indicating that for respondents making decisions on 'the front line' they may have only a few minutes to make a decision given the number of issues and/or people waiting in the queue, whereas the Ombuds or staff has the ability to spend a much longer period of time researching what the rules and regulations are and if there are no specific guidelines or rules in existence, the ability, via quiet contemplation, to think about what would be the fair route to take in particular circumstances.

The expectation that an Ombuds will be singularly focused on handling complaints in order for fairness to prevail is explicitly stated in many Ombuds' statutes such that the incumbent shall not occupy any other paid or public roles during their term in order to avoid real or perceived conflicts of interest. For example, for those who work in the organizational model of practice, an Ombuds cannot be a full voting member of the International Ombudsman Association (IOA) if the individual fulfills two roles simultaneously, (e.g. Ombuds and Ethics Officer or Ombuds and Associate Dean). However, these data demonstrate the reality that this expectation goes far beyond traditional definitions of 'conflict of interest' to providing the Ombuds with the benefit of sufficient time and space to thoroughly excavate her own reactions for evidence of bias or partiality. The analysis advanced by these interviewees regarding the advantage of having sufficient time and how only one mandate supports their quest for impartiality adds much greater richness to the importance of a singular focus. However, it is worth noting that

there are Ombuds roles in Canada where the incumbent is the Ombudsperson on a half or part time basis while fulfilling another role within the organization, (e.g. professor or student or Ethics officer). In these kinds of situations it was opined that specific steps would have to be taken to reduce the perception of the potential for conflict of interest given multiple working relationships and reporting relationships. Similarly, it was argued that it would require exceptional ability and personal credibility in order to overcome the potential for the perception of partiality and lack of independence given the responsibilities of the other role and the proximity and affiliation the Ombuds has with respondents or complainants in her other capacity.

#### 9. Turn It Upside Down

Another interviewee described a technique which he had learned from a visual artist who showed him how he used a mirror to see his paintings while they were in progress from a different perspective. This interviewee found that he could use the same technique in difficult cases where his initial reaction was to assume the complaint was not legitimate based on the complainant's *style* of presentation. The need to do this could run the gamut from the complainant's inability to articulate her concern clearly due to various social factors to a degree of elitism or self regard that included disregard for normal responsibilities. Ultimately, by re-conceptualizing the issue presented by making himself look at it from a completely different perspective he was able to move forward in an appropriate manner. This approach, while described in less picturesque ways, was used by other interviewees as well to assist them to re-orient their thinking to increase their potential to be impartial by not allowing the *style* of the complainant or respondent to supersede the *substance* of the matter under review.

## 10. Sustained Effort

While the degree of difficulty associated with aspiring to think and act impartially is woven throughout this commentary, it is also crucial to acknowledge the import of the generally held belief that constant and continuous attention to the aspiration of impartiality is key to the success of implementing the foregoing strategies or techniques. The following comment summarizes well this widely held belief:

Well the other thing we do is that you can't have an oversight function and expect adherence to fairness from bureaucracies if you can't do that yourself. That seems trite but it [impartiality] takes a lot of work. And it is not work that is ever finished. It is ongoing. Human development or just reminders.<sup>773</sup>

All of the data analyzed regarding the rationale for and the application of the foregoing techniques were eloquently summarized by a thoughtful practitioner in his description of his constant vigilance of his reactions to individuals and their stories. When he realized he had jumped to a premature conclusion he said he did the following: "A kind of reality check. Hold on, I can't draw that assumption until more information has been gathered. It is unfair, unprofessional. I know better".<sup>774</sup> In addition, the interviewee observed that he also had the time to and benefit of being able to talk through difficult cases with a colleague. In working through his reaction he explained: "So talking through also helped to break down the bricks of whatever barriers that I may have erected, and preconceived notions that I may have been entering into this matter with".<sup>775</sup> In addition, this interviewee spoke to how his lengthy experience in roles that required impartiality was beneficial to him in many ways, and noted that notwithstanding this experience, he was also acutely aware of his, and in his view, everyone's ongoing potential for bias and partiality.

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<sup>773</sup> Interviewee D.

<sup>774</sup> Interviewee T.

<sup>775</sup> *Ibid.*

The theoretical constructs that emerge from these data regarding impartiality as aspirational are based on the following components: an individual must have adopted personal values that embrace and emphasize open mindedness; have developed the ability to be introspective and highly evaluative of one's own reactions and performance as well as the time, contextual knowledge and discipline to focus on the complainants' and respondents' input and perspectives on the matter in dispute. The insight generated by these practitioners suggests further that the notion of impartiality should not be considered to be an essential characteristic or element or a standard operating principle that is static or achievable in nature. This belief challenges the unequivocal statement made in *Régie* that "While independence can be seen as a continuum, the same is not true of impartiality. An agency can be either impartial or biased: there is no intermediate option."<sup>776</sup> I would argue that it would be much more accurate to say that an Ombuds (or the individuals who populate an agency or a tribunal) must make every effort to be as impartial and as unbiased as possible. It will likely come as no surprise that two interviewees had already moved beyond the notion of impartiality as an absolute or a commodity that one acquires upon appointment to a role by promoting the view that impartiality should more realistically be known as a 'best practice'. This kind of terminology evokes the notion that the capacity to act as impartially as possible results from knowledge, skill and experience when compared to bench marks established informally in a collegial manner or in conjunction with or imposed by an external body.

Notwithstanding the insight generated by these interviewees, given how closely connected impartiality is to the perception of fairness, the notion of 'best practice' does not convey to me the degree of rigour, import and personal commitment that I see as being

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<sup>776</sup> *Régie*, *supra* note 335 at 7.



necessary in this context. In contrast, another interviewee described impartiality as "...an imperative..."<sup>777</sup> which I believe has more standing and is a more compelling expectation. Given that 'imperative' when used as a noun, is defined in the Oxford English Dictionary as "Demanding obedience, execution, action, etc.; that must be done or performed; urgent; of the nature of a duty; obligatory",<sup>778</sup> this term in my view is a more accurate demonstration of what aspiring to impartiality requires. As the data reveal that striving for impartiality requires a high level of continuous attention and activity, both intellectual and behavioural in nature, this commitment to skill development so as to operate at as sophisticated a level as possible, is only realistic, in my view, if it is seen to be an indisputable obligation. Clearly, while impartiality for an Ombuds is a 'duty' that is imposed on the practitioner by the construction of the role whether it be by statute or policy, it also a 'duty' the practitioner must personally adopt and embrace as is evidenced by the personal commitment required for the constant self examination needed for continuous improvement espoused by many interviewees. By accepting impartiality as an imperative the practitioner must also commit to continuous skill development. Therefore, I am positing that 'imperative' is a much more accurate and powerful descriptor for the aspiration to impartiality than is the use of terms like 'best practice' or 'guiding principle' or 'essential characteristic'.

As the data demonstrate that impartiality is not a characteristic that is static, I would argue that depending on how self-aware the practitioner is, how meaningful impartiality is to the practitioner, and how much effort is expended, the greater potential there is to become more highly evolved and therefore more effective in this area. While to do so requires constant attention it appears that in some situations, as the social

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<sup>777</sup> Interviewee D.

<sup>778</sup> Oxford English Dictionary Oxford University Press, 2011 online: Oxford English Dictionary <<http://www.oed.com>>.

psychology research provided earlier suggests, it becomes easier with frequency and longevity. However, as is demonstrated by this interview data, intense and lengthy effort should not be seen as a cure-all as one must be mindful of the fact that interviewees with many years of experience spoke to the continuing difficulty inherent in overcoming biases and stereotypes. Therefore, it is axiomatic that Ombuds (and by extension ADR practitioners and adjudicators) have to be careful not to be complacent and to think that because they are both experienced and committed to the imperative of impartiality that they are aware of and catch every trigger so as to recognize and overcome every biased or stereotypical thought. Consequently, I would agree that impartiality as an aspiration in addition to being an imperative for an Ombuds can also be seen as comparable to being highly motivated to change a destructive behaviour. Specifically, the Ombuds must have the desire to think and behave as impartially as possible and, I would argue, equally importantly, the requisite skills to effect the necessary changes. Subsequently as noted earlier, being as impartial as possible is more akin to developing a skill than it is to acquiring knowledge or making a commitment to a particular set of values as the intellectual efforts and behaviours leading to impartiality have to be constantly refined in order to be successfully implemented. Notwithstanding the fact that a particular type of personality may be better suited to striving for impartiality than others, the data reveal the reality that the capacity to be as impartial as possible requires continuous effort and attention. While I would argue that total or perfect impartiality is never attainable or achievable I contend that the data shows that it is reasonable to aspire to be impartial and to actually demonstrate a high degree of impartiality in many situations if an Ombuds (or other dispute resolution practitioner) is highly motivated to do so and develops and maintains the requisite intellectual and behavioural skills.

In examining the debate around the viability of impartiality one must also look at the term of 'neutral' as it is often equated with 'impartial' or used to define impartiality. However, the majority of the interviewees concluded that 'neutral' and 'impartial' have different meanings. However, within this view there was a spectrum of opinions in that some interviewees were adamant these terms had very different meanings whereas others thought while they were different they were still pretty close in meaning. In opposition to these views, one interviewee indicated that she had thought about these terms extensively and came to the conclusion that 'impartiality', 'neutrality' and 'unbiased' all had the same meaning and had determined there was no benefit to be had in any further debate about the matter. Other interviewees were much more equivocal in that they thought the terms were close in some ways but in others were dramatically different. As was identified in the earlier discussion of the challenges to impartiality in Chapter Three, the majority of interviewees were of the view it was impossible to be neutral as opposed to something one could strive for or aspire to as was the case with impartiality. I wondered if there might be a notable difference between people who were trained and practiced as lawyers and non-lawyers, given that the professional education of lawyers would be very similar versus the many different types of professional education represented within the group of interviewees who are not lawyers. Interestingly, 33% of the interviewees who had trained and practiced as lawyers thought the terms had the same meaning and for the most part had not considered the question before. However, when they started to think about whether or not there was a difference or whether these terms were synonyms, their comments suggested their interpretations became less straightforward as a result of thinking about what the terms actually meant. In contrast, 65% of the interviewees who were not trained as lawyers thought 'neutrality' and

'impartiality' had very different connotations and had given the examination of the meaning of the two concepts significant attention as part of their thinking about how they perform their jobs.

One example of the definition of 'neutral' provided by an interviewee was that it meant not caring about the parties to a dispute which was anathema to his view of the proper implementation of his role. Another interviewee, who is a lawyer, made the same distinction between these two terms but for a different reason. He said:

You cannot be neutral because in the face of injustice, being neutral means being indifferent. In the face of seeing something wrong that you should address, ask someone to correct or even make a proposal for a solution to redress the injustice, being neutral means at the limit, being passive.<sup>779</sup>

In this individual's opinion being neutral meant not fulfilling the role of Ombuds properly as to be neutral would mean not addressing unfairness.

Another interviewee who is not a lawyer defined 'neutral' as not having any personal opinions or being affected by past experiences that are similar to or remind you of what you are currently addressing. Her view was that "...Truly neutral would require that you would just be so new or fresh to a situation you don't carry any related baggage".<sup>780</sup> In her view this was impossible and therefore should not be used in connection with the role of Ombuds and the approaches used. It is instructive to learn that a number of interviewees indicated that over time they had come to the conclusion through thinking about how their role should be described that they would no longer use the terms of 'neutral' or 'neutrality' to describe the role or the manner in which the work is done as they now saw it as being a wholly inaccurate descriptor.

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<sup>779</sup> Interviewee K.

<sup>780</sup> Interviewee O.

Conversely, another individual expanded on the notion of 'neutral' by specifically describing it as a feeling about a situation or an issue, that is, you cared about it or you didn't or as a response to reviewing a particular situation, by saying: "Or in a case where, ...there is misunderstanding, really obvious misunderstanding, I find those situations easier to be neutral. The clearer, I suppose the clearer the case, the more neutral...You feel neutral about it or you don't."<sup>781</sup> This description provides more food for thought in that it is possible the reason for the interviewee not caring about a dispute is that the issues brought forward were not important to her which could be due to a different form of bias. Whereas the majority point of view was that it is impossible to be neutral in that all that an individual has experienced and learned can not be excised from one's psyche prior to looking at an issue consistent with the interpretation articulated by Justices McLachlin and Heureux-Dubé in *R. D.S.*<sup>782</sup>

Another interviewee who is also a lawyer made the type of distinction that has been identified by mediators in the development of the term of 'equidistance'<sup>783</sup> by stating:

There are times when I would argue that you need to be less than completely neutral. And I use those words "in order to be impartial". So if there is a power imbalance in the parties in negotiations you may consciously you know shift yourself to the less empowered person in order to make sure that there is impartiality of the process.<sup>784</sup>

While not articulated in the same manner as described above, a number of interviewees spoke to the power differential that is often in play between the complainant and the respondent and the seminal role that an Ombuds plays in attempting to provide balance or

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<sup>781</sup> Interviewee H.

<sup>782</sup> *R.D.S.*, *supra* note 397.

<sup>783</sup> J.Rifken, J. Millen & S. Cobb, *supra* note 394 at 152 - 153.

<sup>784</sup> Interviewee B.

'level the playing field' between disputants who occupy dramatically different social locations.

Another individual who distinguished between these two terms saw impartiality as recognizing and overcoming biases but said:

Neutrality I think I view a little bit different because I can have those biases or perceptions of bias but yet can still be neutral in my decision-making. So that's how I would kind of separate the two. So I can still have those biases but ...remain neutral in my decision...<sup>785</sup>

The difficulty with this view is that no explanation was provided for how the inherent biases acknowledged by the interviewee were separated so they had no impact on her judgment. Perhaps, though, it's reasonable to assume that an experienced and self-conscious practitioner would be relying on the various strategies described earlier and therefore would see no need to explain how the separation referred to was achieved or maintained.

The data have demonstrated that initially a number of interviewees saw 'neutrality' and 'impartiality' as synonyms whereas when they thought about these terms even a little bit they made fine and/or significant distinctions. In contrast, other interviewees stated unequivocally these terms were synonyms and had no interest in breaking them down. Interestingly, the manner in which some of the interviewees' engaged in this area of discussion telegraphed to me that they saw the similarity or dissimilarity of these terms as so obvious that they queried internally why would anyone be interested in comparing and contrasting them. I had the impression that the initial reaction for some interviewees was: Why waste your time thinking about this when it's so obvious they are the same or for others, it is so obvious that they are not at all comparable. It is instructive, as noted earlier, that one interviewee had thought about the terms in an in-depth and painstaking manner and came up with 'yes, they are the same' while other interviewees concluded after

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<sup>785</sup> Interviewee Y.

lengthy service in their respective roles and consideration of how they should be described, that 'neutral' and 'impartial' had completely different meanings.

The theoretical direction that the data has lead me to is that when the majority of practitioners are challenged to think about what neutrality and impartiality mean they identify differences and the majority would agree with the majority SCC opinion in *R.D.S.* on this matter. This development is important as it strikes me as being crucial for practitioners to be very precise when using the terms of 'neutrality' and 'impartiality' so that they don't give the wrong impression to complainants and respondents, and discredit the role of Ombuds or the incumbent, as those they interact with may have also thought about the viability of neutrality and have rejected it.

#### Analysis of the Construct of Independence

The interview data demonstrate that the broad continuum of structural independence that spans from traditional arenas of dispute resolution, such as courts of law, to administrative tribunals to various ADR processes like arbitration and mediation, is also readily evident within the Ombuds community. Specifically, within the Ombuds world there is a lengthy gamut moving from those roles that have a very high degree of structural independence to identically named roles that have virtually no structural independence. Strikingly, within this niche area of dispute resolution, there is also variation within the enabling legislation underlying various Ombuds roles that generally speaking provides a high degree of structural independence. For instance, different degrees of traditional contributors to independence can be found on an individual basis within statutes, (e.g. length of term, and whether the term is renewable and if so, what type of renewal mechanism should be used; as well as the processes required for auditing the financial records). Much more dramatic and significant differences were evident between Ombuds

offices established within private and public sector organizations founded by policy or terms of reference or different types of governmental tools. Not surprisingly, the offices that do not have a legislative base have a much lower level of traditional indicia of structural independence. However, while the structural protections (or lack of) are idiosyncratic it is most notable that for virtually all interviewees while structural independence is recognized as being ideal, in the final analysis, it was the majority opinion that it is the mindset of the incumbent that determines whether or not the Office is actually independent, regardless of how it was established. In addition, many Ombuds with very low standards of structural independence, demonstrated a high degree of confidence in the strength of their capacity to handle situations as they saw fit with no external influence and to make wide ranging and/or specific recommendations without the security and protection provided by traditional forms of structural 'independence'. It seems reasonable to accept these interviewees' assessment as being truthful and accurate for their situations as they readily acknowledged the potential for the opposite perception to prevail for those who were not familiar with their work.

Another factor that it is relevant to this discussion is that it appears that those who apply for the position of Ombuds which is set up on a defined term basis, have already accepted the fact that regardless of how well they fulfill the role, it is by definition a time limited role. If the term is renewable it must also be recognized that many variables can affect whether Ombuds are renewed regardless of the incumbent's effectiveness. As result, I would argue that those who apply for Ombuds roles are acutely aware of the inherent lack of long-term job security and perhaps by virtue of self-selection, are more independent by nature.



### Definitions of Independence

By way of foundation for this discussion, all interviewees made comments that indicated they had accepted traditional definitions of independence by providing commentary like: "Independence is the ability to act and speak without threat of consequences to my position";<sup>786</sup> "Independence is the ability to undertake the mandate of the office without political or bureaucratic interference";<sup>787</sup> "A Chinese wall"<sup>788</sup> between us and the administration";<sup>789</sup> "Free to say and do and act in a way that you feel is appropriate given your mandate, without fear of...reprisals";<sup>790</sup> "The operational independence to go look at those issues as we see fit and to not have dictated us where we should go or where we shouldn't go in terms of our examinations";<sup>791</sup> "Excluded from the hierarchy of ...and from all of its bureaucracy and governance issues".<sup>792</sup> The notion of operational freedom was expressed by "No second guessing."<sup>793</sup> and "A finality of some kind".<sup>794</sup> One interviewee took the 'distance' metaphor a step further and posited the belief that "Independence is the distance"<sup>795</sup> between yourself and an institution, the person or a subject that allows you to be perfectly impartial and fair".<sup>796</sup> Given historical antecedents and the judicial opinions cited earlier, and the traditional view that structural independences is the foundation for impartiality, it was surprising that only two of the

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<sup>786</sup> Interviewee H.

<sup>787</sup> Interviewee D.

<sup>788</sup> I am aware that the use of this term is not acceptable as noted by Justice Low "The term has an ethnic focus which many would consider a subtle form of linguistic discrimination. Certainly, the continued use of the term would be insensitive to the ethnic identity of the many persons of Chinese descent. Modern courts should not perpetuate the biases which creep into language from outmoded, and more primitive, ways of thought." in *Peat, Marwick, Mitchell & Co. v. Superior Court* 200 Cal.App.3d 272, 293-294, 245 Cal.Rptr. 873, 887-888 (1988). I have observed through conversation that an alternative term now in use is 'ethical wall'.

<sup>789</sup> Interviewee E.

<sup>790</sup> Interviewee G.

<sup>791</sup> Interviewee M.

<sup>792</sup> Interviewee W.

<sup>793</sup> *Ibid.*

<sup>794</sup> Interviewee A.

<sup>795</sup> I have the impression 'distance' in this instance included both physical and psychological dimensions.

<sup>796</sup> Interviewee C.

twenty interviewees, with dramatically different degrees of structural independence in comparison to one another, indicated they predicated their capacity for impartiality on these structural underpinnings. In contrast, the vast majority of the practitioners indicated that structural independence in and of itself does not ensure a high degree of impartiality.

With exception to the two references to legislated or policy-driven independence providing for impartiality, the other interviewees' descriptions of their understanding and demonstrations of independence were multiple and diverse in orientation. To begin, the two most predictable and obvious distinctions made were '*de jure*' [by law] independence and '*de facto*' [by practice] independence. The traditional trappings that provide for *de jure* independence included being established by legislation; being appointed for a term of reasonable duration,<sup>797</sup> rather than serving 'at pleasure' of the appointing body; tabling annual and special reports with a legislature or Parliament, or governing council or board of directors, instead of to an elected official or senior government or organizational leader; the ability to initiate own motion inquiries and/or investigations; the ability to determine procedures for handling cases; receiving a fixed budget allocation (with no further involvement from the funder other than meeting the requirement to report on activities on a regular and timely manner); and the ability and the responsibility to issue public reports with no requirement to acquire prior approval of a report or the conclusions and recommendations contained within it in advance of releasing it publicly.<sup>798</sup> These kinds of protections were interpreted by the interviewees to mean that Ombuds in these circumstances experienced no interference with the way they implemented their mandates, (e.g. how the office was organized; how investigations and other complaint

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<sup>797</sup> The ideal length of term was identified as five to seven years. However, some terms were renewable and some were not.

<sup>798</sup> In some instances the courtesy of advance notice of the dissemination of a report is provided. However, given the manner in which Ombuds reports are developed, the content of the report should not be a surprise to the respondent or legislature or organization when it is released.

resolution activities were undertaken; and how monies were allocated for appropriate delivery of services) other than the requirement to report on the activities undertaken by the Office on at least an annual basis and to demonstrate fiscal accountability.

The notion of *de jure* independence was often characterized by the interviewees as providing for easily articulated and recognizable distance from elected officials, civil service employees and the institutions they oversee. As noted above, reference was also made to the importance of 'distance' from subject matter as well by one interviewee. However, this kind of distance is difficult to imagine unless one is referring to the actual machinations, such as the policy-making or decision-making processes, that lead to the subject matter becoming a point of contention. One interviewee expanded on that notion by making the point that independence should not be construed to mean that you are so far removed from the jurisdiction or the place and time in which you work, " that you live in a monastery somewhere and you don't know what eBay is..."<sup>799</sup>

Another interviewee indicated that a very high degree of structural independence gives the incumbent both "peace of mind"<sup>800</sup> and the ability to "speak [his] mind"<sup>801</sup> in an appropriate and respectful way. However, it was observed by a number of interviewees that there is no absolute freedom in any situation, as even with a very high degree of structural independence economic forces may result in changed circumstances. For instance, large budget cuts due to austerity programs are applied to many government and organizationally funded entities. This has in fact happened for many Ombuds offices over the years and could not be avoided regardless of the high level of structural independence in place. It is also worthy of note that a change of leadership in a

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<sup>799</sup> Interviewee A.

<sup>800</sup> Interviewee K.

<sup>801</sup> *Ibid.*

government or an organization could result in the respective enabling legislation or policy or terms of reference being amended or even repealed. In addition, it must also be emphasized that a high degree of structural independence does not prevent an individual who does not want to 'rock the boat' by virtue of personality or long term career aspirations or who is very positively disposed toward a particular government, union or management group's modus operandi, from adopting a passive or even sycophantic role. One could also imagine that some Ombuds could be similarly inclined as some judges are as speculated by Lawrence Baum to communicate in such a fashion so as to please particular audiences.

It was also observed by some interviewees that in some jurisdictions with very small populations or in relatively small organizations, even though all the requisite formal structures may be in place for a high degree of independence, it may not be feasible to actually be independent of all issues and the individuals involved. By virtue of working in such a location, it is often impossible not to know the parties or someone who knows them well or to have been exposed to the issue being brought to your attention as a complaint in other ways beforehand. Therefore, in these scenarios, it was advanced that the independent mindset and the capacity to think and act impartially are much more important than the existence of formal or *de jure* structural protections. However, the strength of one of the formal trappings of structural independence, that being, the inability for the Ombuds to be fired without a very good reason like personal misconduct, was identified as being useful for providing a tangible indicator of the high degree of separation between the Ombuds and the appointing body when a complainant queried whether the Ombuds Office was actually an independent entity.

Another interviewee who had experience in a number of different Ombuds settings noted that the size of the organization also has implications for the perception of independence in a different way. Within a very large organization, it was observed that it is much more difficult for potential critics to say the Ombuds is closely affiliated with someone or some unit as the number of possible affiliations is so vast; whereas in a smaller organization, the Ombuds has to be much more vigilant not to be seen to be too closely connected or affiliated with particular individuals or a unit of the organization simply by virtue of proximity to a particular location. As was stated by Justice L'Heureux-Dubé in *Régie*, one interviewee recalled that independence is required but is not all that is needed for impartiality to prevail.<sup>802</sup> In fact many interviewees shared this core belief but reinterpreted it to refer to *de facto* rather than the *de jure* independence as envisioned by the Supreme Court jurists.

It is noteworthy that the overwhelming feedback from the majority of the interviewees who had very little structural independence demonstrated unequivocally that they believed they could be and were seen to be extremely independent. In fact, it was stated by some individuals that if they felt any attempt to compromise their operational independence they would not be able to continue in the role. In addition, an interviewee with the highest degree of structural independence commented that he thought those without that protection could still operate as independently as he does by virtue of the Ombuds' personal approach.<sup>803</sup> As is demonstrated by the commentary of many of the

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<sup>802</sup> *Régie*, *supra* note 335.

<sup>803</sup> To date, I am not aware of an Ombuds being terminated prior to the expiration of the term in Canada for unpopular actions, views or reports. However, there have been occasions where Ombuds have not been renewed when their terms ended, e.g. Federal Ombudsman for Victims of Crime, Steve Sullivan (2010); Veterans Ombudsman, Pat Strogan (2010). In the case of the Veterans Ombudsman role it was acknowledged by the federal government that the length of the term was too short and it was extended from three to five years when Guy Parent was appointed as the second Veterans Ombudsman; and the Yukon territory Ombudsman was not renewed in 2012 for a second five year term. In contrast, high profile Ombuds who have issued scathing reports have been renewed to fulfill a second term, i.e. Ontario Ombudsman, Saskatchewan Ombudsman, BC Ombudsperson, Newfoundland and Labrador Ombudsman.

interviewees, it is their belief that the personal commitment to and their ability to think and act as impartially as possible so not to be influenced improperly is significantly more important than various forms of legislated or organizationally structured distance.

The expectations for and descriptions of *de facto* independence, that is working in an independent manner without any structural protections, or as one interviewee coined as “working without a net”<sup>804</sup>, were very similar to those provided by those who enjoyed *de jure* independence. It was frequently stated that it is ultimately the individual who occupies the position who determines and demonstrates whether the Ombuds mandate will be implemented in an independent manner. Notwithstanding this important personal characteristic, it was also recognized that to have structural protections in place for creating a high degree of independence certainly made it easier to assert independence to those whose understanding of independence was tangible in nature. Concrete examples that emerged as indicators that both contributed to, but ironically, depending on the circumstances, could also have a deleterious effect on the notion of independence are analyzed next.

### 1. Reporting Relationships

For Ombuds who are paid for their services directly by the organization for which they had oversight, an interesting criterion for creating independence was identified as the personal view or understanding of the Chair or President or Chief Executive Officer (CEO) as to what actually constituted independence. Those individuals who indicated they felt no pressure of any kind described relationships that were respectful and separated from the executive function while knowing they had the full confidence of the person to whom they ultimately reported from an administrative perspective. Clearly this finding has important

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<sup>804</sup> Interviewee Q.

implications for the establishment of Ombuds roles and the import of the approach taken by organizational leaders to demonstrate to others in the organization that the role should be as independent of all other roles as is possible. In addition, though, one interviewee spoke to the benefit that the CEO's deferred authority added to the respect for the Ombuds role. As with many complex issues, that which can be very beneficial in one area can also ultimately be a detractor. For example, if the CEO who expresses such confidence in the Ombuds was also perceived to control the Ombuds' activities, that would be the death knell of *de facto* independence. However, if, as was the case in the scenario described, the CEO expressed high regard for the role and the work of the incumbent as well as articulating the commitment to and the importance of the Ombuds being wholly independent of the management hierarchy, the message delivered was ideal. To demonstrate the lengths that some CEOs went to in order to ensure as a high degree of independence as possible, some interviewees noted that mechanisms had been put into place to provide for the review of complaints about the President or CEO's actions using alternative means, that being, those that are separate and apart from the most senior employee such as addressing the complaint directly with the Board of Directors or a comparably constituted body. This kind of arrangement is presumably an attempt to parallel the right that legislative Ombuds have to bring an unresolved issue to the attention of a legislature while recognizing that the constituencies involved and the governance structures are very different in nature.

## 2. Collaborative Relationships

Some additional examples of contributors to independence which may be surprising given the foregoing commentary and conventional markers of independent bodies include the importance of respectful and collaborative relationships with service

providers and potential respondents. One interviewee who enjoys a very high degree of *de jure* independence noted that:

The other part of independence for me is, I believe that part of independence is that I can have ongoing and good communication with ...officials as well. I think some might say independence means the less communication the better, but in my mind I think I need to have that kind of interaction and again you can't have that if you feel there isn't going to be independence.<sup>805</sup>

Other interviewees reiterated this point of view by discussing the importance of having forthright and informal conversations to resolve individual complaints in a way that could only be accomplished by having a mutually respectful and collaborative approach. A very similar point of view was expressed by other interviewees who indicated that it was consistent with their high degree of independence, either *de facto* or *de jure*, to also work with representatives of the organization, institution or government to identify and correct system-wide or systemic problems quickly and informally. Working within this conceptual framework, distance is not the epitome of the gold standard for independence. Rather, it is the capacity to *bridge* the distance between Ombuds and respondent in such a fashion so as to maintain an independent outlook and status while solving problems informally and expeditiously in a cordial<sup>806</sup> and respectful manner. Taking a slightly different tack on the same subject, another interviewee connected the importance of working with respondents in a constructive manner to impartiality rather than independence. However the outcome was the same in that he observed "One has to, one can be impartial but one also has to be aware that you can't do your job making enemies wherever you go. That will impact ultimately your ability to be there for the complainant community as a whole".<sup>807</sup> This

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<sup>805</sup> Interviewee B.

<sup>806</sup> It is instructive that when I had this discussion with the interviewee and the term 'cordial' was raised we discussed how these relationships evolved and I made use of the term 'friendly' as a paraphrase of the discussion. Interestingly, the interviewee made a point of correcting me to say that 'cordial' was a more accurate descriptor of the nature of the interaction than 'friendly'.

<sup>807</sup> Interviewee T.



comment underscores the daily realities of attempting to resolve disputes with a wide variety of parties and those with whom an Ombuds or staff will be in touch with repeatedly due to the volume or nature of the issues received or a particular respondent's wide span of control. In those kinds of situations the Ombuds and staff can not be regarded with enmity or disputes would not be resolved informally and the Ombuds would be rendered ineffective as respondents would not engage in an enthusiastic way to resolve disputes, rather they could avoid contact or at worst stonewall. If this type of dynamic developed the only way to fulfill the Ombuds' mandate would be to go forward on all issues in a formalistic and potentially adversarial manner and the success achieved through early resolution activities which are so much the norm for Ombuds work would be lost.

One interviewee indicated that the work of the Office had been enhanced by the following belief system:

Our work is more effective when we are welcomed in that we are not seen as some sort of finger pointers or blamers. You know I am not coming to find blame here. I just, you know, I am going to point out that this is an issue here and I repeatedly say, ... that we have the same goal, to make the system better.<sup>808</sup>

A similar perspective was enunciated in the following manner:

The independence certainly helps but I think the independence and the respectful relationship go hand in hand. I think [the respondent] has to know that for that level of interaction to work, [the respondent] needs to know that we are not out there intentionally trying to embarrass them. That it is not our goal just to look backward, find fault and assign blame. We are there to make the delivery of the public service better.<sup>809</sup>

Another interviewee emphasized a similar sentiment by indicating that her approach is not "...about finding fault and error and then the things that might result from that, compensation, penalty, public humiliation, whatever it is. It is not about that. It is about

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<sup>808</sup> Interviewee A.

<sup>809</sup> Interviewee W.

finding instances where there are opportunities to improve...".<sup>810</sup> This interviewee also indicated that her approach was predicated on recommendations being formulated in a fashion such that "...improvements should take place so that they are meaningful and genuine and reflective of the core issues, values, concerns, of the complaint originally".<sup>811</sup> Hence when recommendations were made, great care was taken to demonstrate a full understanding of the essence of the issue and to emphasize education and development of the respondent rather than punishment of a perpetrator, while recognizing that disciplinary action could be recommended when appropriate. All interviewees identified the importance of making credible recommendations that addressed both individual concerns and contributed to system-wide or systemic improvements, whether they did so after an investigation had been undertaken or by raising an issue informally and simply talking it through in order to achieve fair and expeditious outcomes.

Another Ombuds made a similar comment in observing that the object of the exercise from his perspective is to improve service and not to try to embarrass, vilify or assign blame. Rather, in his opinion, the Ombuds role is in place for improving the delivery of services both in specific instances and on a general basis. Concomitantly, the style of interaction used and recommendations made flow from that orientation rather than from an adversarial and punitive approach. Another interviewee illustrated his similar belief in the following manner:

I don't believe an Ombudsperson can perform his or her duties by being too aggressive and just plumb everyone over the head so to speak. There has to be a middle ground. Facilitation. Bringing parties together, because I think there are greater changes or greater possibility of change through an air of co-operation. Convincing the respondent, and hence the complainant, that to consider such a path will benefit them and the [community served] as a whole.<sup>812</sup>

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<sup>810</sup> Interviewee P.

<sup>811</sup> *Ibid.*

<sup>812</sup> Interviewee T.

Another interviewee commented in a like manner by stating that “everyone has a different approach and I think we all rely on our strengths and part of it for me is the interpersonal relationships that allow me to have those candid and sometimes informal conversations that still get results”.<sup>813</sup> Clearly, from the majority of interviewees’ perspectives, and based on my own experience in a wide variety of Ombuds settings, respectful collaborative activity is a key element of the Ombuds role and complements rather than compromises both *de facto* and *de jure* independence.

### 3. Generalist vs. Specialist

One interviewee raised the unique point of view that as an Ombuds of general jurisdiction - whether it is for a governmental jurisdiction or an organization - the Ombuds often had to address many different types of issues without the benefit of being an expert or a specialist in any particular area, other than in fairness. The sense is that this fact contributed to both the perception of and actual independence. For instance, as a result of not having engineers investigating complaints related to engineering faults, or health professionals investigating complaints about the minutiae of a particular medical procedure, it was much easier to demonstrate that the review was truly independent as the emphasis was on proper process being undertaken rather than on the technicalities of a particular matter. This is a provocative view with respect to hiring decisions as some organizations have decided that an Ombuds must have subject matter expertise, (e.g. professor or senior student for Ombuds in higher education). Similarly, the same approach has been taken with particular Ombuds roles where the focus is specialized, (e.g. The Veterans’ Ombudsman is a veteran; the Victims of Crime Ombudsman has background in criminology; the various Ombudspersons for law societies in Canada are all lawyers and

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<sup>813</sup> Interviewee D.

members of their respective law society.) Similarly, bank Ombudsman are always drawn from the individual banks' employee group, as is the case with media Ombuds roles. It will require further research to determine whether a generalist or a specialist is better prepared to be and seen to be independent of the subject matter brought forward for review.

#### 4. Social Interaction

An example of how some Ombuds maintain their independence is to be seen not to be privy to 'insider talk'. This is often achieved by being located some physical distance away from or in separate premises from the executive offices or as expressed by one interviewee, being far removed from the "mother ship".<sup>814</sup> In a similar vein, another interviewee talked about the importance she ascribed to consistently demonstrating she had no social interaction with employees of the organization by never attending organizational events that had a social component, (e.g. retirement parties, holiday meals, etc.). In complete opposition to that view, another Ombuds indicated how important it was to her to attend organizational events of this nature in order to raise awareness of the work of the Office. In her view, not to attend events of this nature and the informal opportunities they provide for contact with a wide range of individuals would be a valuable opportunity lost for ensuring potential users of the service were aware of its existence and scope. Similarly, in her experience based on information requested of key informants, polite social interaction had not compromised the perception of either complainants or respondents or, in her own assessment, the reality of the independence of her role and her approach. Once again, opposite points of view on the same variable were articulated by thoughtful and experienced practitioners. I would argue that these points of views are indicative of the constant tension an Ombuds must deal with regardless of where the role is located.

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<sup>814</sup> Interviewee W.

Ultimately, the decision on how much contact or how little contact is appropriate, (outside of the complaint handling process), must be made on a case-by-case basis.

#### 5. Funding and Employee Status

For those Ombuds who were employees of an organization, many, but not all, commented on how the fact they were paid by the organization had been raised as a concern by some people who were seeking a review of their concern or complaint. Some interviewees indicated that they used humour to address this kind of comment by saying something to the effect that they were not being paid enough to be untruthful and by explaining openly the nature of their employment relationship. In many cases, the interviewees were of the view they had been able, both by virtue of their candour and how they handled the file, to overcome any preliminary or lingering perceptions of a lack of independence. Two interviewees were incredulous about what they deemed to be the unreasonable expectation that if an Ombuds received financial compensation for their work from an organization or from a government body that they had compromised their independence. One responded to this belief by providing the explanation that "I'm not the fairy of fairness who volunteers my time".<sup>815</sup> Another interviewee echoed this view by stating how he had taken pains in various interactions with potential complainants and respondents to make the following point: "I don't work for free".<sup>816</sup> Other interviewees took a different approach and countered this concern when raised by complainants by explaining that they were not decision-makers for the organization and were not part of the management hierarchy. One interviewee said some Ombuds she had encountered had suggested that in order to be independent "...you can only work off-site if you are going to

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<sup>815</sup> Interviewee F.

<sup>816</sup> Interviewee K.

be independent and give me a cell phone and pay me through PayPal".<sup>817</sup> She was flummoxed by that this notion as it appears those Ombuds who espoused such a definition of independence were not taking into account the fact that financial compensation was still being provided by the appointing body regardless of how it was delivered to the incumbent.

The belief of inherent dependence that derives from being paid by a governmental or organizational entity in some fashion for delivering a service are confounding to me as they relate to Ombuds as it is well known that the judiciary and administrative tribunal members in Canada, all of whom are appointed by the government of the day, are also paid with government funds. The high degree of structural independence articulated for the terms of employment for the judiciary in *Valente*<sup>818</sup> no doubt supports the confidence that is shown by some in the untouchable status of judges. Nonetheless, it is still surprising to me that the origin of the financial compensation is considered to be an indicator of 'dependence' as some Ombuds employed by organizations are even more independent than judges with respect to administrative matters in that they are able to hire and supervise all of their own staff and determine their employees' remuneration and duties as well as the location of their physical premises without any input from the funder. In addition, some Ombuds have their compensation established in such a fashion that the per annum rate rises on a percentage basis without any involvement from any party so as to remove any perception that the Ombuds' compensation is tied to performing in such a way so as to please the funder(s). Similarly, some interviewees spoke to the fact that the financial penalty the organization would have to bear for firing them as a result of disagreeing with a report or recommendation, was so significant that it served as a strong

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<sup>817</sup> Interviewee F.

<sup>818</sup> *Valente*, *supra* note 664.

deterrent to any interference. One Ombuds referred to this deterrent as 'condo clause',<sup>819</sup> which was often used to illustrate to constituents why the employer would not intrude on the Ombuds' independence and allay any fears they had about the Ombuds' willingness to take a controversial issue forward.

Some other interviewees spoke to the fact that since they could only be terminated for personal misconduct, they saw this as adequate protection against any potential for reprisal or retaliation for actions taken or recommendations made. One interviewee took another approach by explaining that the conclusion that employee status lead to lack of independence was countered by this recitation of how the role had been established:

the fact that the creation of an Ombuds in an organization, was done willfully with no constraints. It was not ordered or mandated by a Court of anything. It was an undertaking of the organization after years of discussions and consultations. It was some sort of bet that the organization took on itself. To be successful with a sense of direction and then you have to be able to say, sure they are serious. If they say they are going to do it, we trust that they are going to do it [properly]...<sup>820</sup>

However, a sceptic may assume that the act of establishing an Ombuds role is solely driven by a desire to mollify complaints rather than to ensure the organization is operating fairly. This assumption can be mitigated by the fact that all organizations receive complaints and not all organizations establish Ombuds roles. As a result, it strikes me as being believable that a progressive organization would embrace the concept of an Ombuds solely for the purpose it is intended, which is to address unfairness and receive negative feedback via an organized and independent process.

Other interviewees commented on the manner in which the funding is funnelled for the operation of the Ombuds Office as being very important to the perception and reality of independence. For instance, in some instances, the funding may be split

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<sup>819</sup> Interviewee K. In this instance the payout the employer would be required to make for ending the contract prematurely was the equivalent of the purchase price for an expensive condominium.

<sup>820</sup> *Ibid.*

between a number of different bodies and sources of funding, and this configuration increased the perception and actuality of independence. It was the interviewees' view that the likelihood of one entity being able to influence the other to pull the Office's funding in order to reduce its effectiveness or terminate the Ombuds was virtually non-existent. As a result, the perception and the reality of the independent nature of both the role itself and the appointee were dramatically increased by equal funding from different entities.

In contrast to the foregoing examples, one interviewee who had lengthy experience in the Ombuds field generally noted categorically that when occupying an organizational Ombuds role, complainants do not accept the fact that the Ombuds is independent due to the employee/employer relationship. As a result, she has become convinced that her commitment to impartiality and the demonstration of it was significantly more important than any attempts to demonstrate the degree of structural independence she enjoyed. She had come to this conclusion even though there were some elements in place like office space in a distant location from the senior decision-makers, a 'hands off' mentality and an employment contract that only allowed for termination on the basis of personal misconduct. Once again, dramatically different points of view were posited on the same seemingly straightforward variable.

## 6. Terms and Tenure

A number of the interviewees were appointed for specific terms, some of which were renewable and some were not. The majority of those that had renewable terms had not been advised of any clearly defined process for how the renewal decision would be made. As a result, one could reasonably conclude that wanting to be re-appointed could compromise an incumbent's independence. However, this particular group of interviewees held the view that if they decided they wanted to be renewed, that desire would have no



influence on how they conducted their work. For instance, one interviewee declared:

“...but the thing is I can live with having tried to make a difference and [failing to be renewed] but I could not live with coasting for ...years and keeping everybody happy”.<sup>821</sup>

A slightly different danger was identified for those who had permanent employee status and lengthy tenure via the comment made by a practitioner of long standing: “But it is a challenge to maintain impartiality, independence, fairness when you’re more and more embedded in an organization”.<sup>822</sup> The tension that comes from the potential to be and/or to be seen to be an ‘insider’ due to lengthy service<sup>823</sup> adds another layer to the degree of self-awareness and self-discipline required of Ombuds in that type of situation.

## 7. Annual and Special Reports

A number of interviewees used ‘the proof is in the pudding’ metaphor to argue that the annual reports of Ombuds can be used to demonstrate both the Ombuds’ independence and impartiality. A number of interviewees were confident that these types of reports, which were designed to be easily accessible to all and sundry, served as an artifact or a paper trail for establishing and confirming the Ombuds reputation for independence, impartiality and fairness. While I agree that reports of this nature fulfill an important function with respect to accountability and credibility, they are not a full representation of all that is done by an Ombuds. While reports contain statistics about the number and type of complaints received and the outcomes in some situations, such a report does not show how the work is done on a day-to-day basis. Therefore, this type of tool is better described as a still photograph in that how the work is actually accomplished

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<sup>821</sup> Interviewee M.

<sup>822</sup> Interviewee O.

<sup>823</sup> I was advised by an Ombuds for an Ivy League institution in the U.S. who had recently retired from her post after a very long tenure (in excess of 20 years) that her biggest concern was how she would spend her newly found spare time as given her commitment to independence she had not established any social relationships in her work environment.

can only be interpreted rather than verified from the narrative descriptions provided. In addition, in order to protect the confidentiality of the complainants, important details are often removed from the case description which can also take away from a full understanding of all that occurred and how the Ombuds actually demonstrated (or not) impartiality and independence throughout the process.

A differing interpretation of how the independence of the role is demonstrated was provided by one interviewee by indicating that appointees were interviewed at length, vetted extensively rather than getting the job "...by lottery".<sup>824</sup> This approach is common to the majority of the Ombuds' appointments which are now predicated on a competitive hiring process and organized in such a fashion that stakeholders of all stripes or representatives of all political parties have to come to agreement on the appointee. By virtue of these processes the perception of the appointee of being independent of the appointing body is increased as the successful candidate is required to demonstrate his suitability for the position over many others rather than being seen as a patronage appointment of the government in power or the CEO or President's personal choice. In addition, the quality of the work done by the Ombuds, year over year, demonstrates the same concept to another interviewee.

In the final analysis, the traditional belief of *de jure* independence being the foundation or a guarantee of impartiality was not supported by experiences described by the majority of the interviewees. Rather, the opposite was argued by many in that their day-to-day and year-to-year experience was that if you have the capacity to be impartial then you can also be seen to be independent on a *de facto* basis because you are so demonstrably independent of mind and action. Therefore, while structural independence

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<sup>824</sup> Interviewee K.

was seen to be beneficial in some ways, it was not deemed to be necessary if the appointee has the strength of character so as not to be influenced by ongoing relationships or personal benefits that could accrue by avoiding controversial matters. From a theoretical perspective, using the 'chicken or the egg' analogy I am arguing that impartiality comes first and is in fact more important than structural independence for the following reasons: an appointee with a high degree of integrity coupled with self-awareness and a commitment to continuous personal development can operate very effectively as an Ombuds with a high degree of impartiality without a high degree of structural independence. Similarly, a high degree of structural independence is irrelevant if the incumbent does not have the desire to be as impartial as possible and the willingness and capacity to develop and maintain the requisite skills for implementation of an independent role for the duration of the term of appointment. However, it must be acknowledged that given the strength of historically held beliefs and the tradition of identifying structural independence as the foundation of impartiality, the existence of an independent status may increase the perception of the impartiality of the Ombuds by some parties, regardless of whether it is in reality a factor of any significance. Ultimately, the majority of the interviewees' commentary demonstrated while structural independence may make the job easier, the seminal requirements for the Ombuds to operate in a manner consistent with the expectations for the role is an independent mindset and the personal commitment to thinking and acting as impartially as possible.

In conclusion, the data reveal with respect to the foundational concept under review, that in the final analysis the vast majority of the interviewees' believe that it is the incumbent Ombuds who is primarily responsible for contributing to the perception of a high degree of impartiality and in so doing is creating conditions that lead to the perception of

some degree of independence by virtue of how she thinks and how she behaves.

However, a government or organization as well as the appointee can also contribute to a perception of actual independence by ensuring the proper set up of the office from a structural perspective, and conveying a strictly adhered to 'hands off' approach regardless of the issue, so as to increase the possibility of the perception of a high degree of independence. As a result, a hybrid or organizational Ombuds who has a very independent mindset and enjoys a long term appointment or permanent employee status along with fiscal and administrative independence and own motion capacity can be seen to be and act as independently as an Ombuds established by legislation with all the requisite means in place for *de jure* independence. These findings have important implications for the personal characteristics that should be sought when choosing an Ombuds. Characteristics such as personal integrity, independent thinker and actor who has the ability to resist internal or external pressure to think or act in a particular manner are therefore crucial. It is also critical that the foregoing characteristics be coupled with the capacity to maintain cordial relationships that provide for opportunities for cooperation as is appropriate to the situation. Similarly, it is important to recognize that structural means for demonstrating independence should also be put in place either by legislation or terms of reference or policy so as to augment the perception of the highest degree of independence of the role and the appointee.

## **Chapter 6: The Intersection of Impartiality, Independence and Fairness**

As the concepts of impartiality and fairness are often intertwined or used as synonyms for one other or even as a definition, (e.g. impartiality = fairness), an examination of how Ombuds and their key stakeholders view these principles is essential to any analysis of how the Ombuds role is configured and implemented. In addition, the degree to which independence and impartiality are connected to perceptions of fairness is necessarily explored. As a result, the manner in which Ombuds determine whether decisions being complained about have been handled fairly will be investigated as well as the interviewees' perceptions of complainants and respondents' views on whether they have been treated fairly. In this chapter, the import of 'impartiality' and 'independence' to Ombuds, complainants and respondents will be identified as well as how these concepts fit into the fairness equation from all three stakeholders' perspectives. This examination is particularly relevant to the deconstruction of the role of Ombuds as holding others to account for fair administration and contributing to an ethic of fairness through orientation and education with respondents and the community served generally, is a defining feature of the Ombuds role. Similarly, articulating and adhering to a high standard of fairness within Ombuds' own practices is also critical to this form of dispute resolution. Therefore, I will begin this examination with an explanation of the various forms of fairness standards used by interviewees followed by their perceptions of how both respondents and complainants determine if an Ombuds has behaved fairly. I will then demonstrate if, and if so, when and how, independence and impartiality are considered critical to either or both Ombuds and complainants and respondents as they pursue administrative fairness.

### Ombuds' Fairness Standards

As Ombuds use many different modalities for resolving complaints, it would be a gargantuan task to discuss the fairness standards employed for the wide variety of activities that are undertaken under the aegis of the Ombuds, (e.g. shuttle diplomacy, inquiries for the purpose of clarification, mediation, investigation, conflict coaching, discussion and evaluation of options), I have focused this research specifically on the standards used when a complaint is being investigated. Notwithstanding the fact that my query to interviewees was oriented specifically to the fairness standards used to determine whether a complaint was valid, it's important to acknowledge that all interviewees conceptualized the investigative process as a continuum. Specifically, prior to discussing the standards used when determining whether a complaint should be supported or not, many interviewees commented on the importance of particular actions being taken before a matter even went forward for investigation. Specifically, it was noted that it was crucial from a fairness perspective to confirm that 1) the subject matter of the complaint was actually within their jurisdiction as articulated in their legislated mandate or terms of reference or policy; and 2) the complainant had already brought the concern to the attention of the respondent (which generally speaking the complainant is expected to do in order for the respondent to have the opportunity to address the matter) prior to the matter being brought to the Ombuds for review, as one of the fairness criteria they use. For obvious reasons it would be unfair for complainants to waste their time being interviewed and providing documents, etc. if the matter could not be acted on by the Ombuds given that the concern was either non-jurisdictional or within jurisdiction but premature in that a final decision had not been made. It was also noted by various interviewees that given the vulnerability of many of the complainants who approach the office, even though the issues

raised are not within their mandates, or are premature, they still believe it is fair and reasonable to spend some time with complainants trying to determine what alternatives for addressing the complaint may be available. Other interviewees took a similar tack in expressing the importance of determining whether the complainant had the capacity to take an issue forward by virtue of inquiring into the complainants' level of knowledge about the dispute resolution process of the agency or organization being complained about and their level of confidence in making use of it. The rationale for doing so was to interact with the complainants in such a fashion that complainants left the discussion feeling sufficiently conversant and confident to take matters forward using the correct path.

After a matter had been investigated, a very compelling argument made by one interviewee was the importance ascribed to explaining to respondents that meeting their legal requirements was not sufficient to demonstrate they had discharged their responsibilities fairly. It was observed that it was not uncommon to be told by a respondent when an issue was raised that no regulation had been violated or law broken. The Ombuds' immediate response was "Okay. That is a good start. Now have you done enough?"<sup>825</sup> This kind of commentary was predicated on the notion that it was expected that in order to be fair the respondent also had to provide as much information as possible while being attentive to the concerns raised and ensuring that others who had requested the same type of service were treated similarly. This approach is comparable to that articulated by other interviewees in various sectors whereby they indicated their fairness standards included looking at the quality of the decision-making process in conjunction with the reasonableness of the outcome as well as taking into account the style of the

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<sup>825</sup> Interviewee E.

communication and whether the complainant was treated with respect throughout the process.

The same concept but articulated differently was captured in the notion of 'raising the bar' which has resulted in the elimination of what could be construed as an arbitrary line which indicated fairness on one side and unfair on another. By moving to this type of analysis, a respondent is asked to consider: Have you done the best you can in this situation? This kind of approach is more reflective of working toward an administrative 'best practices' methodology rather than accepting the meeting of minimum legal requirements or rigidly applying a policy without taking into account the context, as an adequate response. As such an approach is not mechanical and therefore requires a higher level of analysis, it strikes me that in order for respondents to believe this type of assessment was done fairly, the Ombuds would have to be perceived as operating on the basis of a very high degree of impartiality.

Surprisingly to me, reference was also made to the use of 'common sense' as a fairness standard which is problematic given our diverse culture, as was discussed earlier in Chapter Three<sup>826</sup> what is considered to be 'common sense' to one person may be unheard of to another or racist or ageist, etc. Even though the term is used frequently in discussions, popular and scholarly literature as well as in jurisprudence, the fact that the use of such a criterion would be promulgated as being adequate for making a determination on whether something was fair is unacceptable, in my view, in the vast majority of instances. Another example that was put forward as an acceptable criterion for determining fairness was the term of 'your judgment'. The use of such a generic term is also difficult to understand when what would be considered to be a fair judgment could

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<sup>826</sup> See Devlin and Pothier's argument at note 519.



vary depending on who is involved in the complaint handling process and the diversity of the complainant and respondent community.

Other interviewees talked about the importance of looking at the matter being complained about in relation to the applicable policies to determine if the respondent had handled the matter fairly. It was also observed that the matter would be assessed to see if the circumstances were such that a deviation or exemption from the policy would be warranted. When the circumstances were such that it was clear that the respondent should have made an exemption, a number of interviewees indicated how important it was to be able to discuss the situation with decision-makers so that they came to their own conclusion that an exception should be made due to the extenuating circumstances. In a similar vein, it was also noted by another interviewee that through an open discussion of information with respondents who originally defended their decisions as being correct, it was not uncommon for reflection on what had transpired to occur. Subsequently, it would then be acknowledged by the respondent that an error was made and corrective action would be taken without any necessity for the Ombuds to form conclusions and recommendations. It was also acknowledged by one interviewee that it can be difficult for respondents who are not familiar or comfortable with the appropriate exercise of discretion to know what to do when the Ombuds calls. Specifically, respondents may remember being advised by the Ombuds previously that they should have followed the applicable policy when it becomes apparent the unfairness occurred because the relevant policy was not followed. This kind of conversation may then be followed by a different discussion with the same Ombuds who will inquire as to why discretion was not exercised in another and, most importantly, very different circumstance. While the Ombuds' expectations for differential treatment in different circumstances, was eminently reasonable and fair, it was

recognized that this level of complexity can be difficult for some respondents to understand and implement.

Reference was also made to the use of 'procedural fairness' and 'the principles of natural justice' as important criteria for assessing whether complaints were valid. When queried about the burden of proof the Ombuds expected, some interviewees indicated they use the 'balance of probabilities' whereas another interviewee indicated that she only operated in the 'clear and convincing' mode and yet another noted that she would determine which burden of proof had to be met depending on the nature of the circumstances associated with the complaint. For instance, she used the 'balance of probabilities' for issues which were largely interpersonal in nature and no witnesses were available, and a more stringent standard of 'clear and convincing' (which is still within the balance of probabilities modality), when records and documentary materials were being reviewed. Typically, both complainants and respondents are advised what standard will be used when a review is being conducted to provide both for transparency and reasonable expectations. A number of interviewees highlighted the use of detailed and robust procedures or guidelines for gathering information; followed by assembling it properly for a thorough review and then assessing relevant evidence to determine if complaints were founded. In some instances, detailed explanations were provided for how a file progressed through the review process and the levels of approval required prior to a final determination being made on the outcome of the review to demonstrate how they determined if a matter had been handled fairly. Interestingly enough, from my perspective, given that the Ombuds role occupies a small niche within the larger realm of ADR there was no commonly stated fairness standard that would be used when determining the validity of complaint. However, it was clear from all of the explanations provided that the

principles of natural justice, which were understood as having the opportunity to know the case against you and to be able to articulate your perspective in response, within the context of an unbiased review, whether titled as such or described as such, were the standard criteria in use. Ideally, this would be the normative standard that would be conveyed to both complainants and respondents in Ombuds' descriptive and promotional literature so that these stakeholders have an accurate understanding of what to expect from an Ombuds review.

Not surprisingly, it was a commonly held belief that compelling arguments had to be developed methodically providing clear rationale for the Ombuds' view on complaints raised in order to be fair and to convince the complainants and the respondents of the soundness of the outcome of the Ombuds' review. It was also noted that a very well articulated rationale for a conclusion and recommendation was not only required for the fairness of the Ombuds process but also to model to respondents the kind of behaviour that was routinely expected of them.

One interviewee emphasized the importance of taking the time to look at all the information gathered in relation to the substance of the complaint and what the appropriate processes were for addressing the problem. He then uses the equivalent of the 'reasonable person' test to say: "If I was 'joe blow' [from the immediate community], some education, a job<sup>827</sup> and I looked at the process that was followed and the decision and how that person was treated, would I think that was fair?".<sup>828</sup> This kind of approach demonstrates the importance ascribed to the substantive, procedural and interpersonal

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<sup>827</sup> A defect in this approach is that there may well be community members who are not employed and/or not educated who may be equally capable of making a proper determination on whether the matter in dispute was handled fairly.

<sup>828</sup> Interviewee L.

aspects of what happened from the perspective of someone who is similarly situated to both the complainant and respondent.

The same interviewee emphasized the importance he places on satisfying himself that he has handled situations fairly by thinking about what he does to ensure he has met the highest level of fairness. He noted how an Ombuds does not have the luxury of saying, after reflection, this wasn't my best effort in terms of behaving fairly but I'll do better next time. The import of this personalized assessment deserves consideration on a more general basis, as typically in Canada, Ombuds' conclusions as to whether to support a complaint may not be appealed. Specifically, Ombuds' Offices established via statute at provincial and territorial levels have privative clauses<sup>829</sup> that restrict litigation to personal misconduct on the part of the Ombuds or staff and to competing views between a respondent and the Ombuds on the Ombuds' jurisdiction. In other words, the complainant does not have the right to appeal the Ombuds' conclusion on whether to support or dismiss a complaint. Therefore, there is virtually no recourse, other than to pursue the substance of the complaint through litigation against the governmental body or organization that made the decision that the complainant brought to the attention of the Ombuds. The complainant who is dissatisfied with the Ombuds' action (or lack of action) can bring her concerns about how the Ombuds has handled the file to the attention of the entity that appointed the Ombuds. However, while the complainant may derive some comfort from telling a body that appoints the Ombuds about her dissatisfaction with how the complaint was handled, it must be acknowledged that government officials, neither

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<sup>829</sup> Section 23 of the Ontario *Ombudsman Act* R.S.O., 1990, Chapter 0.6 is demonstrative of the strong privative clauses enjoyed by Ombuds of general jurisdiction established via legislation in Canada: "No proceedings of the Ombudsman shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of the Ombudsman is liable to be challenged, reviewed, quashed or called in question in any court." The Alberta *Ombudsman Act* RSA 1980 has identical wording at Section 24.

elected nor Deputy Ministers, nor organizational officials, have the ability to interfere with or change the Ombuds' determination.

While Ombuds in other forms of practice (hybrid and organizational) do not enjoy this type of legislated immunity, usually if the complainant disagrees with the Ombuds, subsequent litigation would likely be initiated against the respondent governmental department or organizational entity for whatever relief the complainant had originally brought to the attention of the Ombuds. This reality highlights the import of the personal integrity and diligence of the office holder and staff for establishing very high standards for evaluating their own behaviour while assessing complaints against clearly articulated fairness standards. Also, as Ombuds typically establish their own procedures for complaint handling, the approach taken and the conclusions drawn have to be very well thought out in order to ensure they are fair as complainants communicating their disagreement on the sidewalks via sandwich boards and/or through cyberspace via twitter and blogs are ultimately the only ways, in many instances, to indicate dissatisfaction or disagreement with an Ombuds' handling of a matter. However, it is important to keep in mind that some interviewees had processes in place for complainants to have the manner in which their complaint was handled to be assessed by an external body, such as a committee of stakeholders, or internally, by other Ombuds staff, who are assembled for determining whether the file was handled as it should have been in comparison to the statute or terms of reference or policy underlying the role. However, it must be recognized that this kind of assessment is conducted similarly to the judicial review process in that the focus is primarily on the process used rather than a review of the merit or substance of the complaint.

In traditional dispute resolution regimes in Canada, it is not considered appropriate or fair for the same body or individual to investigate an allegation and then also decide on its proper determination. For example, the police investigate an allegation; the police on their own initiative and/or on the advice of the Crown Attorney lay charges and a judge or jury determines guilt or innocence. Similarly, in a non-criminal setting, the Public Sector Integrity Commissioner identifies the clear demarcation of investigative processes from decision-making as a 'best practice' in a symposium report focused on building trust between the private and public sectors.<sup>830</sup> In *Régie* while it is acknowledged that "While a plurality of functions is not necessarily problematic in a single administrative agency..."<sup>831</sup> it is emphasized that "Prosecuting counsel must never be in a position to participate in the adjudication process. The functions of prosecutor and adjudicator cannot be exercised together in this manner".<sup>832</sup> In considering the plurality of functions undertaken within the Ombuds role, it must be kept in mind that Canadian Ombuds neither prosecute nor adjudicate. Nonetheless, I explored Ombuds' perceptions on the fairness of conflating the role of investigator with determining the validity of the complaint. Specifically, as Ombuds are often sole practitioners or operate with a very small staff, it is possible that an Ombuds could undertake the investigation of a complaint and then assess the evidence amassed in order to form a conclusion and if appropriate, make recommendations. A broad range of perspectives was presented on this issue in that some interviewees were strongly in favour of the Ombuds being kept separate from the investigation process and the final determination that would be made on whether the complaint should be supported. One

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<sup>830</sup> Office of the Public Sector Integrity Commissioner of Canada, "Symposium Report - BUILDING TRUST TOGETHER: The public and private sector experience" (2008) online: Office of the Public Sector Integrity Commissioner of Canada <<http://www.psic-ispc.gc.ca>>.

<sup>831</sup> *Régie*, *supra* note 335.

<sup>832</sup> *Ibid.*

interviewee, in particular, was adamant that it was crucial from his perspective to only be reviewing the evidence gathered by investigators rather than participating in this phase of the complaint review process so as to be seen to be as impartial as possible. He indicated "within the office there is a very clear divide between who collects the evidence and who assesses it".<sup>833</sup> Other interviewees thought it would be ideal to organize their work in this fashion. However, as they are sole practitioners or if not working alone, resources are limited to the extent that if they removed themselves from the investigative process the work of the office would not be accomplished in a timely or effective manner. Other interviewees did not get involved until the end when determining whether recommendations should be made and what type, but were not concerned about the separation of these functions for fairness reasons, rather they had organized the complaint handling process in this fashion for operational efficiency. Other interviewees from all sectors saw no difficulty with the Ombuds being involved both in conducting the investigation and forming conclusions and recommendations for one primary reason, that being, the Ombuds was making a recommendation on the basis of a conclusion(s) being reached rather than making an enforceable decision or issuing a directive. For example, some interviewees indicated that as the Ombuds has no ability to coerce anyone to do anything and no capacity to implement a recommendation on their own, the fact that an Ombuds is both investigating a complaint and then deciding what the final determination would be is irrelevant from a fairness perspective. One interviewee thought the collapsing of roles was not an issue as in the Ombuds sector no damages are awarded, if it is determined a mistake was made. However, from my vantage point it is important to take into account the reality that Ombuds' recommendations are generally taken very seriously

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<sup>833</sup> Interviewee D.

and to suggest the Ombuds' influence is not significant would be incorrect in most settings. In addition, recommendations are routinely made that result in individuals receiving benefits that may be financial in nature or that result in eligibility for or increased services that when quantified would represent a substantial financial gain to a complainant and the requisite allocation of resources by the organization or institution. Also, the notion of an Ombuds not having any capacity to exert pressure that could result in a recommendation that was initially rejected being accepted is not necessarily viable, as many Ombuds have the ability to take a recommendation that has been dismissed at a lower level to higher levels of the organization or government for further consideration. Ultimately, many Ombuds have the ability to publish reports about recommendations that are rejected (or accepted) on either an annual or special report basis. This kind of ability suggests to me that while there is no power of enforcement within the Ombuds role on a *de jure* basis, for many situations there is a possibility that an Ombuds' recommendations will be accepted in order to avoid any public controversy. Hence, the lack of 'power to enforce' or to award costs for damages is not a viable argument in favour of discounting the perception of potential unfairness inherent in the collapsing of investigative activities along with determining the outcome of the complaint. However, I would argue that the practical reality of a sole practitioner or a small office having no alternative but to fulfill both an investigative and determinative role, is defensible on the basis of the use of a fair and transparent investigative and assessment process conducted by a self-disciplined practitioner who is acting as impartially and as independently as possible.

Ironically, from the point of view of this research, only one interviewee mentioned 'impartiality' as being integral to the fairness of the Ombuds' own review process. In addition, none of the interviewees included 'independence' as a criterion for the fairness of



their own processes. Perhaps neither term was specifically enunciated as these elements are considered to be implicit to all Ombuds' work. Nonetheless, from my perspective, the lack of comment about impartiality and independence as specific fairness criteria was striking given the subject matter under discussion and the usual construction of Ombuds roles.

#### Ombuds' Perceptions of How Complainants Define Fairness

Initially, it was unanimously stated by all interviewees that complainants' perceptions of fairness were predicated on the quality of the communication between the complainant and the Ombuds office. The importance of respect and courtesy, coupled with sufficient time to provide all of the information they thought was relevant resulted in complainants stating they felt heard, respected and fairly treated. Another element that was repeated frequently as an indicator of fairness was the importance of timeliness as 'justice delayed' was perceived as 'justice denied'. The other elements which were identified by the majority of the interviewees included the necessity of demonstrating openness and transparency of the process by explaining carefully what steps would be taken in addressing the complaint when, why, by whom and how. The manner in which the Ombuds or staff approached their work was also seen as crucial for demonstrating that a thorough and fair methodology was diligently implemented in reviewing the complainants' concerns as the degree of professionalism attributed to the Ombuds or staff contributed significantly to the complainants' perception of a credible and fair process.

It was also noted that, in some instances when complainants did not get the outcome they wanted and they concluded that the reason for that was that the Ombuds was not impartial, these Ombuds found their best defense was the ability to demonstrate that the implementation of a very sound review and assessment process based on a

rigorous methodology had resulted in unequivocal reasons for why the complaint could not be supported. However, it was recognized that even when using the best possible review process, some complainants still only believe the complaint was handled fairly if they get the result they want. Once again, this outcome reinforces the notion of the Ombuds having personal responsibility for setting high standards for himself when evaluating the quality of his work as neither complainants (nor respondents) may be able to step outside their self-interest to do so.

One interviewee whose experience is that complainants are very satisfied with the fairness of Ombuds' reviews emphasized that in the initial discussion with complainants every effort is made to explain very carefully that the Ombuds Office will also be interacting with the respondent in the same way. For instance, the complainants should expect the Ombuds will be listening to everything both the complainant and the respondent has to say as well as keeping each party abreast of what is happening. As a result, each complainant is fully aware from the first interaction that the respect and attention provided to him will be replicated with the respondent. This example was used to demonstrate the importance of educating the complainant about the even handed nature of the process and is emblematic of the importance ascribed to ensuring complainants understood the Ombuds would not be going forward on the basis of advocating or representing the complainant.

Some interviewees indicated that in an effort to ensure complainants do not feel unfairly treated when it becomes clear that the complainant's only interest is gaining financial compensation, they take great pains to explain before the complaint is even reviewed with the respondent, that a financial settlement may not necessarily come to be, as the complainant's position may not be supported and/or if supported, financial

compensation may not be warranted, given the totality of the circumstances. Other interviewees explained that as part of their commitment to fairness they will attempt to manage complainants' expectations in other ways, that is if a complainant indicates she is expecting an outcome that the Ombuds has no authority to recommend, such as the Ombuds ordering the firing of a staff person the complainant dislikes, a great deal of effort is made to educate complainants on what are possible outcomes if a fault is found so that they do not enter the process with unrealistic or unreasonable expectations. In a similar trajectory another interviewee indicated how difficult it can be to assist some complainants to understand that while a complaint may be founded, the Ombuds' view and the complainant's view on what would be a fair outcome may be dramatically different, given the Ombuds' responsibility to take into account the proportionality of the matter. It was noted that in situations where a minor mistake was made that has minimal negative impact, the Ombuds may make a recommendation for an apology to be issued and training to be done so it doesn't occur again, whereas the complainant may expect the staff person involved to be fired or to receive financial compensation. It was observed by some interviewees that when those kinds of situations develop, whereby a complainant's expectations are unrealistic or unreasonable, even with the best up-front orientation as to the responsibility of the Ombuds to be fair to all concerned, it is virtually impossible to come to a meeting of the minds, between the Ombuds and the complainant, on what is a fair outcome given the circumstances.

One interviewee spoke to the fact that on some occasions, a complainant will approach the Ombuds only to advance concerns for the benefit of system- wide improvement as they see the errors made as isolated or minor in comparison to all of the other positive benefits that have accrued to them. In stark contrast to the aforementioned

magnanimous approach, a number of other interviewees spoke to the unfortunate reality that in some situations even though an error is found and a recommendation is made, the circumstances are such that the clock can not be turned back so as to benefit the complainant personally. In situations of this nature while the complainants have contributed to system-wide improvement and their complaint has been supported as valid, they are not satisfied with the result. This kind of scenario was used by a number of interviewees to demonstrate the difficulty they had in reconciling what the Ombuds had determined to be feasible and fair with some complainants' desires and expectations for retribution to be meted out to the respondent, regardless of the circumstances. In being well aware of the potential for this kind of complainant discontent, other interviewees explained that they work very hard to ensure each complainant feels that he or she has received some benefit from interacting with the Ombuds even if their complaints are identified early on as not being within jurisdiction or premature. Similarly, the same intensity of effort is made later on in the process, as it becomes clear that the complaint will not be supported, by providing explanations for alternatives or engaging in discussion about how to raise a complaint in a constructive manner so as to have greater potential for useful interaction with a decision-maker in the future. As a result of these activities, in some instances, some Ombuds have found that complainants will say they found the Ombuds to be both fair and helpful, even though their complaints were not supported.

Finally, the importance of providing a very good explanation for why the Ombuds had arrived at the conclusion not to support a complainant was considered fundamental to complainants' perception of the Ombuds' fairness. One interviewee noted that in 99.9% of matters reviewed, complainants would be convinced of the validity of the outcome and the Ombuds' fairness on the basis of the reasons provided. It was acknowledged that while

they may not be happy with the outcome they deemed the process to be fair. However, other interviewees indicated they had encountered much lower levels of satisfaction when complaints were not founded even when the best rationale possible had been provided. In those instances, interviewees noted the complainant's entire focus was on whether he or she got what they wanted even though they acknowledged they were satisfied with the quality of the interaction and the review process. It was also a widely held point of view that if complainants misunderstand the role and can not be convinced of the fact that the Ombuds is not able to act as their representative or advocate, the complainant will always be unhappy with the result even if the review process was implemented flawlessly.

The Ombuds' individual perceptions as cited above were also supported by surveys that a number of interviewees undertake on a regular basis. From their own surveys and evaluation efforts, these Ombuds indicated the respect shown to the complainant and the quality of the communication was given very high ratings. However, the survey data also showed that there are always some complainants who do not correlate the quality of the interaction and the review of their complaint with the Ombuds behaving fairly, if their complaints are not supported. In those instances, it was noted that while the majority of complainants indicated they appreciated the chance to be heard by voicing their concerns and to have them considered carefully in an even handed way, some still concluded that the Ombuds was unfair if they didn't get the result they thought was warranted.

Another means to obtain feedback was offered by two interviewees who indicated that they deliberately solicit comments from third parties, advocacy groups and informants from specialized fields whenever possible, to get a sense of what complainants are saying about the fairness of the Ombuds. They found that the feedback they receive is generally

positive in that while there are informants who say they may not always agree with the outcome determined by the Ombuds they believe the issues were fairly considered. It was also noted that these informants continue to refer complainants to the Ombuds given their positive perception of the fairness of the complaint handling and review process and will speak publicly about their belief that the Ombuds is fair. The supposition is that individuals in these roles have the capacity to see the big picture, even though they do not always agree with the Ombuds' assessment on every issue raised by the individuals they serve or represent.

Interestingly enough, only infrequently was commentary made about the importance of impartiality and strikingly, none of the interviewees commented on the importance of independence to complainants' perceptions of the fairness of the Ombuds' process. Once again, perhaps these characteristics are considered to be implicit to the role and that is why complainants' do not make note of this concept and as a result they did not figure prominently in the Ombuds' understandings of complainants' perceptions. In the final analysis, the data revealed, that in the majority of situations, the interviewees' experience is that the complainants who make their discontent known are primarily concerned about the quality of the interaction, and ultimately in some situations, whether they got what they wanted. As a result, the structural aspect with respect to the independence of the review process and how it is organized is irrelevant to them. However, it is worthy of comment that it was noted by one interviewee that if the complaint is not supported then it is not unusual for the complainant to conclude that the Ombuds was, by definition, partial to the respondent and not operating independently. Given this logic, it could be argued that for some complainants, it may be that only their perception of

the absence of impartiality is worthy of comment if their complaints are not found to be valid.

#### Ombuds' Perceptions of How Respondents Define Fairness

It is noteworthy that the vast majority of interviewees indicated that their experience is that complainants and respondents use the same criteria to decide whether the Ombuds has behaved fairly. Specifically, they expect the Ombuds to approach the matter or issues raised in a professional and courteous manner using a clearly articulated and fair review process whereby the respondents have the opportunity to provide their point of view on the matter under consideration. It would seem *pro forma* but some interviewees spoke at length about the importance of ensuring that the respondent had been given the opportunity to address the matter before the Ombuds brought it forward for consideration as a complaint. Also, it was a generally held view that when the Ombuds finds that errors have been made and recommendations are put forward to correct them, a key element of the respondents' perception of fairness, is whether the recommendations made are credible and realistic.

A number of interviewees observed that as they do not enjoy *de jure* independence and respondents know the Ombuds is a fellow employee, independence is irrelevant as a fairness criterion even though there are various means in place to create distance and reduce the possibility of inappropriate influence from other employees. As result, in these interviewees' experience the respondents are very focused on the extent to which the Ombuds has demonstrated a high degree of impartiality through the quality of the work done, both during the review of the matter and in the rationale provided for the conclusions reached.

A number of interviewees spoke to the importance of having the opportunity to interact informally with respondents so as to resolve complaints that are founded expeditiously and fairly. By approaching matters in a way that allows respondents to identify when a mistake has been made themselves, there are many situations where there is no need for the Ombuds to make recommendations as the respondent analyzes the issues raised and comes up with what are fair, mutually acceptable and appropriate remedies. One interviewee went further to say that in particular situations when it becomes clear to all concerned that the respondent made mistakes, as soon as the respondents recognize it, they commit to correcting the errors. As a result, it was emphatically stated that "...there is no need to make a public spectacle of it".<sup>834</sup> The debate then arises as to whether mistakes *should* be publicized in some fashion for the benefit of others, (e.g. to educate other employees so they can recognize where errors were made and how to avoid them in their work, or, alternatively, for potential complainants to become aware of how they should be treated and/or how their claims should be processed). In addition, publicity on Ombuds' interventions and conclusions can build awareness of the role of the Ombuds on a more general basis and of the responsibility for respondents to do their work fairly. In opposition to this line of thought, a substantial number of interviewees also spoke to the fact that the ability to work informally with respondents on the basis of raising issues respectfully and giving them the opportunity to make necessary changes without exposing them as inept, when it is appropriate to do so, is a key element of being seen to be fair. In addition, interacting with respondents in such a manner results in a reputation for fairness that precedes the Ombuds or staff and bodes well for future encounters. One interviewee made the case in

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<sup>834</sup> Interviewee F.



relation to the importance of dealing with respondents in a fashion that allowed for giving them the benefit of the doubt when it was readily apparent that mistakes had been made but the errors were due to a lack of knowledge rather than for disregard for policies or fairness principles, by saying:

They didn't mean to do this. They didn't know any better. So. Now that they know better, they will do better. And I think that opens up the doors later on if you need to deal with them on another issue. It is always better they assume that you are going to be fair because [they] know you were fair the last time and you gave them the opportunity to rectify the situation.<sup>835</sup>

Also, it was observed by some interviewees that by approaching respondents in a fashion that demonstrates the Ombuds is looking for organizational improvement and accountability rather than to assign individual blame allows for much greater opportunity for the Ombuds to garner additional information for use in identifying and then addressing major systemic or system-wide issues. As respondents in these situations are no longer fearful that individuals will be vilified or that their unwitting individual performance or unintended mistakes will be dissected in the public domain they are both open and cooperative. Also, it was observed by some interviewees when Ombuds demonstrate that their wide ranging powers of investigation will not be abused for personal aggrandizement or to demonstrate power over others, the respondent is more likely to see the Ombuds as acting in a fair and reasonable matter. When the respondent experiences this kind of approach they are comfortable asking for assistance and suggestions for improvements rather than reacting with fear and/or responding in an adversarial fashion and resisting implementing what are reasonable recommendations given the situation. One interviewee noted that in some cases respondents welcome the Ombuds' involvement as they know there are system-wide issues that require improvement but they haven't been able to

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<sup>835</sup> Interviewee F.

motivate these changes themselves. Respondents that fall into this category hope that as a result of the Ombuds' review, recommendations will ensue which will lead to greater allocation of resources and/or a beneficial re-organization. It was observed that these kinds of reactions from respondents are particularly likely to occur when the respondents believe that the Ombuds' objectives are the same as their own which was articulated by one interviewee as "we have the same goal, to make the system better".<sup>836</sup>

On the face of it, the principles of impartiality and independence and cooperation or collaboration may seem to be in conflict but in actuality, these principles can be separate but mutually beneficial depending on how the collaborative effort is undertaken. However, it would seem that it would be especially important for the Ombuds to ensure that he is interacting with respondents in such a way that the complainants would not see the willingness to work cooperatively as collusion or as demonstrating a greater degree of identification with the respondent than the complainant, which would ultimately result in the loss of both independence and impartiality. One mechanism that I rely on personally is that an Ombuds should conduct herself as if both the complainant and the respondent are observing the discussions the Ombuds has with either party. If the interaction was audio or videotaped, the normative standard would be that the Ombuds would feel comfortable with both sides seeing and listening to what was discussed and how the discussion ensued.

It is noteworthy that one interviewee described a unique experience whereby the role of Ombuds is so firmly identified with the term of 'advocate' in the respondents' minds, regardless of how she conducts herself, that respondents do not expect her to behave fairly when interacting with them. She noted how in one situation a respondent commented on how much she appreciated the Ombuds' empathy for her situation and the

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<sup>836</sup> Interviewee Y.

respect shown for the rationale the respondent had provided for a decision that then became the subject of a complaint. The interviewee emphasized that this response was an anomaly as generally speaking the respondents' wrongly and strongly believed that the role of Ombuds is that of an advocate or representative for one group of constituents, regardless of the facts of the case under review. As a direct result of this erroneous perception, this interviewee's experience was that both complainants and respondents based their belief on whether she was fair on whether the outcome was favourable to them. This kind of experience speaks to the benefit of an Ombuds having the ability to accept complaints from all constituents who populate an organization or a political jurisdiction so that they are not seen to be solely identified with one group, (e.g. as an Ombuds for students or an Ombuds for faculty or an Ombuds for employees). Also, as this particular Ombuds' role had been established on the basis of a relatively short term, it was difficult for the incumbent to establish a personal reputation for *not* serving as a zealous advocate for individuals, regardless of the circumstances, so as to supersede the respondents' overarching erroneous impression of how an Ombuds is expected to fulfill her role.

#### Are Complainants and Respondents' Perceptions of Fairness Intertwined With Independence and Impartiality?

Given the fact that fairness is traditionally and contemporaneously a central construct for the establishment and ongoing existence of an Ombuds role, I discussed with each interviewee whether the Ombuds believed that complainants and respondents' perception of the fairness of the Ombuds was connected to the concepts of independence and impartiality. The responses were fairly evenly distributed around the possible combinations. For example, some of the interviewees believed the perception of

impartiality was significantly more important to both complainants and respondents than independence. However, it was noted by one interviewee that while *de jure* independence was not important to the complainants in her practice they wanted to be assured the Ombuds role was not part of the 'bureaucracy'. It was also observed that when the Office was seen to be impartial by respondents, then other staff of the organization would contact the Ombuds to ask for information on trends in complaints received so they could use that information themselves to improve services. It was noted that this level of disclosure did not occur with some respondents who always thought the Ombuds was advocating for a particular individual or cause (even though the Ombuds was advocating for a fair response for all involved) when the circumstances were such that a complaint was found to be valid.

The conundrum that is illustrated by the foregoing example deserves further explanation as it was discussed at length by a number of interviewees. The issue at play is that while Ombuds typically describe their role as an advocate for fairness rather than as an advocate for a particular individual, it is often difficult for respondents to make that distinction as they are wedded to the notion of whether their view of the situation prevailed, or simply put, 'who wins'. As a result, when the Ombuds makes a recommendation that is fair to all concerned after an impartial review *and* an individual complainant benefits, the respondents' erroneous perception, in some instances, is that the Ombuds has taken up the individual's cause as his personal representative. A number of interviewees noted how difficult it is to overturn this type of misconception regardless of the soundness of the rationale for the recommendation and the high degree of impartiality demonstrated by the Ombuds.

Another group of interviewees believed the respondents' perception of fairness came from the track record established by the Ombuds as it had been demonstrated firstly

through the personal approach and reputation of the Ombuds, and secondarily, from the annual reports prepared by the Office. It was emphasized by these interviewees that this kind of track record readily demonstrates the Ombuds' capacity to be impartial even when not structurally independent. One interviewee in this group commented particularly on how the Office often comes to be inextricably entwined with the Ombuds' personality and approach so the incumbent has to be extraordinarily vigilant in all interactions, even when not involved in discussions about complaints, to be seen to be as objective as possible.

It was very difficult to categorize some of the interviewees' responses with respect to independence, which initially appeared to be the principle that they thought contributed most to the perception of fairness, as their understanding of independence was so highly individualistic. For example, some interviewees stated that independence was more important than impartiality. However, it was also observed that if the incumbent was not also seen as impartial, the Ombuds would not be described as fair. Another interviewee thought impartiality was subjective therefore not quantifiable like independence and neutrality are (in his view), therefore by process of elimination, independence was more important to others' perceptions of the fairness of the Ombuds. One interviewee favoured independence as most important but this belief was complicated by the notion that once the Ombuds is advocating for findings and recommendations to be accepted, the Ombuds is no longer impartial. This perception struck me as being idiosyncratic to this individual as the standard expectation is that the Ombuds actually remains impartial throughout the whole complaint handling and review process and when forming conclusions and then making a recommendation(s) is advocating for an ethos of fairness generally rather than solely for the benefit of a particular individual, regardless of the circumstances.

Yet another complication came about through the views of some interviewees who had concluded that fairness came from being seen to be cooperative and no reference was made to either independence or impartiality and their connection to fairness. Finally, a number of interviewees were unequivocal in their beliefs that independence and impartiality and fairness were inextricably intertwined and if either impartiality or independence was not evident, the Ombuds would be perceived to be unfair by complainants or respondents. Perhaps the belief that the principles under review are intertwined explains why very little direct commentary was made about the importance of impartiality and independence to complainants' and respondents' perceptions of the fairness of the Ombuds' process in response to my query about how fairness is perceived by these actors. If Ombuds think of independence and impartiality being so thoroughly imbedded in the role that they are considered implicit, it may be that it never occurred to the interviewees that additional explanation was required. Also, it is worthy of note that the view that independence and impartiality and fairness were inextricably entwined was expressed exclusively by those Ombuds with *de jure* independence but not all Ombuds with *de jure* independence shared this view. As a result of the disparity in opinions about this matter, the only conclusion that can be drawn is that the interviewees had very different experiences in relation to respondents' and complainants' views on whether impartiality and independence are connected to perceptions of fairness. This outcome is surprising given how Ombuds offices have been created by statute and by policy to promote fairness with great emphasis being placed on providing for as much independence as possible and that the work should be done on an impartial basis. However, as noted previously, the expectation for independence and/or impartiality may be considered implicit to the role so perhaps complainants and respondents did not

comment on it unless posed a specific question about its impact or absence. These outcomes demonstrate how important it is for individual Ombuds to develop some means to elicit the criteria that complainants and respondents use to determine whether an Ombuds has acted fairly so as to assess the quality of their own practice. This kind of feedback could then be used to determine whether adjustments in the type of communication and/or education of complainants and respondents are required.

It was very interesting to learn that one interviewee advised that she believed she had been impartial when in working in other roles which were advertised as such but now as a result of being immersed in the Ombuds role, she realizes she wasn't acting impartially in her other roles. Specifically, in non-Ombuds roles, she realized she was ultimately responsible for limiting liability and while she thought she was acting impartially and would have been offended if anyone had said otherwise, in the final analysis that was not the case. I find this observation particularly significant given, as has been pointed out previously, the tag of impartiality is applied to many roles in both the private and public sectors. However, the insight obtained by this interviewee only came about as a result of having had the opportunity to work in other so-called impartial roles prior to becoming an Ombuds. Following in this trajectory it would be important for Ombuds to be mindful that they may also fall prey to being partial to the organization or government that has appointed them, in order to be seen to be adding value to the organization, or the complainants who approach them, without realizing it as well.

As was demonstrated in the analysis of impartiality, these data underscore the importance of Ombuds' being aware of what constitutes fairness in particular circumstances and holding themselves personally accountable for behaving fairly as some complainants and respondents do not necessarily concern themselves about whether

independence and impartiality are in place unless they disagree with the Ombuds' conclusion on the complaints under review. This reality reinforces the importance of Ombuds holding themselves responsible for demonstrating the highest level of fairness throughout the complaint review process by devising and publicizing transparent means for demonstrating the criteria that complainants and respondents can use to evaluate whether the Ombuds behaved fairly. In addition, Ombuds must have the self-discipline, humility and honesty to make their own determination on whether the complaint was valid as the self interest of complainants and respondents may be so great that they may not be able to come to a fair determination.

Once again, the perceptions provided by the interviewees demonstrates that, in their experience, respondents and complainants believe the independence of the Ombuds is predicated much more heavily on 'independence of mind' or an independent mindset rather than the trappings of structural independence. This finding reveals that it is the self-awareness and self-discipline coupled with the use of defensible systematic approaches that are indicative of the Ombuds' capacity to fulfill the role independently. Accordingly, greater weight is placed on a high degree of impartiality and the resultant perception thereof, as the primary requirement for the Ombuds to be seen to be operating fairly. In addition, the data shows that the perception of fairness was also firmly based on the Ombuds' method of communicating with complainants and respondents so as to be able to explain in a manner that is credible and with evidence that is convincing as to whether to support or dismiss the complaint.<sup>837</sup>

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<sup>837</sup> It must be reiterated that this research queried only the perception of fairness as it related to investigative process and outcomes. Due to the high volume of work that is undertaken under the aegis of early resolution, it was impossible to interrogate this area of Ombuds work as well.



In the final analysis, though, it must be acknowledged that Ombuds can not rely solely on complainants' and/or respondents' assessment alone as these assessments may be based on their interest in getting what they believe is deserved and/or an inaccurate assessment of their own level of altruism. Therefore, neither the complainant nor the respondent may be a fair arbiter in the assessment of the validity of their own actions and of the Ombuds' performance. As Ombuds may be prone to the same type of self-interestedness or unaware of partialities and prejudices which inhibit a fair review, the same question must be asked about the degree to which an Ombuds can be relied on to accurately assess the fairness of her own actions. Can we realistically assume that Ombuds have the capacity to jettison the self image they have established based on an over arching philosophical commitment to fairness, to then look at their own actions, without this anchor of positive bias in place, as objectively as possible? These data provide very clear direction that the majority of Ombuds did recognize that they must be extraordinarily vigilant and brutally honest when assessing the fairness of their own actions as there may be no one else who is able to do so with any degree of objectivity. Also, as no one else is actually in a position to do so on any kind of rigorous basis, unless parties are asked by the Ombuds for their input via a third party or anonymous evaluation process, it is incumbent on Ombuds themselves to arrange for as many means as possible for acquiring feedback on how the role is implemented with respect to the demonstration of impartiality, independence and fairness.

## **Chapter 7: Conclusion**

While my empirical research was focused on the specialized and unique area of dispute resolution engaged in by Ombuds, I am positing that the results arrived at are applicable to all who engage in traditional as well as other forms of dispute resolution as a third party, on an arms length basis, e.g. as an adjudicator, a mediator, arbitrator or a member of an administrative tribunal. My rationale for this claim is both my primary and secondary research has revealed or confirmed (depending on the perspective of the reader) the answer to one aspect of my central research question in no uncertain terms: Is impartiality achievable, aspirational or impossible? The research results demonstrate, unequivocally, that impartiality can only be explained and understood as aspirational, as human beings can not purge themselves of all their knowledge and experience that create negative or bad biases or predispositions, both known and unknown, thus colouring all that is seen and influencing all actions taken and conclusions reached or decisions taken. Simultaneously, it is also clear that there should not be any attempt to become a blank slate as the self-knowledge gained through introspection plus as much familiarity as is possible with the experiences of those that are different from our own is necessary for thinking and behaving as impartially as possible.

In an effort to move the notion of impartiality forward from a philosophical discourse to ways and means of meeting this legal requirement, (which has many different meanings depending on the context and the parties involved), I am positing the theory that impartiality should be understood as an ***imperative*** for the proper implementation of the role of the Ombuds (as well as others who are assisting with the resolution of disputes as a third party). Consequently, by definition, this imperative must be enthusiastically embraced by the practitioner. This paradigm is very different than the notion of a 'best

practice' or a 'guiding principle' or a 'characteristic' or a bullet point in a position description. Instead, it is a duty and an obligation to perform to the highest standard possible that is ever present in all the activities undertaken by the Ombuds. The impact and result of accepting this personal obligation is it must also be readily recognizable by others in all their interactions and observations of all dimensions of the implementation of the Ombuds role. It must also be emphasized as once this imperative is embraced there is no 'opt out clause' for Ombuds, in particular (unless the circumstances of the case require recusal) as the conclusions formed and actions taken are typically not appealable or justiciable in Canada, other than in the court of public opinion. Given the finality of the Ombuds' view of a matter, those who occupy this role must operate at the most advanced level with respect to demonstrating the highest degree of impartiality as possible all of the time.

My research results also demonstrate that developing an impartial way of thinking and behaving is a **skill** that has to be developed and maintained via intentional and considerable ongoing effort. Therefore, the incumbent must begin by committing to this imperative both for self and staff, and constantly reflect on and evaluate progress made so as to be able to determine what are appropriate improvement strategies. As with any skill, working toward being as impartial as possible has to be learned and maintained and if the appointee does not have sufficient practice or does not devote sufficient attention to self evaluation the individual can lose skillfulness and capacity. Former Chief Justice Barak of the Supreme Court of Israel framed the requirement for this type of skill building within the judicial context as [the judge] "...must be capable of looking at himself from the outside. He must be capable of analyzing, criticizing and controlling himself." <sup>838</sup>

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<sup>838</sup> Beverly McLachlin, *supra* note 399 at 8.

Given that many of the interviewees had similar personality characteristics, that is, curious and inquiring, I suspect the ability to achieve a very high level of skill in this area is also analogous to the individual who has the good fortune to be endowed with particular physiological attributes (e.g. excellent eye/hand coordination or perfect pitch). Using these scenarios as examples, individuals with these capacities may be able to develop tennis playing skills quickly or pick up unknown songs easily, often much faster than someone who is not so inclined. I would argue that this type of skill building is comparable to developing the capacity for impartiality. Specifically, if an appointee has the type of personality that is curious, open and inquiring which is *then* coupled with the desire and the skills to self-regulate, communicate well and to empathize, it will likely be easier for an appointee with these characteristics to develop and maintain a high level of impartiality. However, I would also argue that those that are very committed to development in this area may be able to do as well or better than those who have simply inherited a particular facility or predisposition given the requirement for continuous and ongoing attention to self development and improvement.

As a high level of self-awareness and self-discipline are base-line requirements for thinking as impartially as possible, these skills must also be well developed and maintained. As a result, an appointee may come to the Ombuds role well prepared as a result of skill building accomplished through previous experience in similar roles and therefore be more mindful of the pitfalls to avoid so as to practice at a high level. However, the appointee or practitioner must be aware, regardless of length of experience and dedication to the goal, that the role is not implemented in a vacuum. Given that circumstances may present themselves which offer different challenges than the Ombuds has faced before and since individual capacities ebb and flow, depending on both

physiological and psychological factors, (e.g. a series of crises and the resultant fatigue; professional or personal stressors or a visceral negative or positive reaction to a complainant or respondent's behaviour or value system), the appointee's best efforts can be thwarted given both the circumstances and the current skill level. In addition, new predispositions and antipathies may arise as a result of the appointee's ongoing lived experience that the practitioner is unaware of until a situation that is relevant presents itself. Therefore, I would argue that the aspiration to impartiality is always '**a work in progress**' and should be accepted as the norm for those for whom impartiality is an imperative for the proper execution of the role. However, as posited by Anderson et al (2007), Nosek & Hansen (2007) from a social psychological perspective,<sup>839</sup> it is heartening to know that individuals can become very good at recognizing and managing biases so that they don't have a deleterious effect on the manner in which an issue is being assessed or as a reaction to a particular style of behaviour. Notwithstanding these well-developed skills and strongly held commitments, the potential for partiality and bias remains ever-present given the fluidity of the environments in which Ombuds (and other third parties as well as human beings generally) operate. Given this reality I am putting forward the following recommendations for skill development for Ombuds (and other third parties) who have embraced impartiality as an imperative that is central to their work:

- Increase capacity for engaging in introspection and building self-knowledge;
- Increase capacity to accept the reality that 'good and bad bias'<sup>840</sup> is rampant in human psyches as a precursor to developing and maintaining

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<sup>839</sup> See Susan Anderson et al *supra* note 649 and Nosek and Hansen *supra* note 654.

<sup>840</sup> See notes 463 and 464, respectively, for a discussion about 'good and bad bias' as defined by Patricia Cain and Justice Beverly McLachlin.

the ability to recognize bad bias and partialities and the effect they have on thinking and behaviour;

- Increase the capacity and continually raise the bar for recognizing triggers that are indicative of bad bias as well as how to appropriately manage reactions to these triggers;
- Increase capacity to empathize and to gain knowledge and insight into the lives of people who are very different than the circumstances of the appointee;
- Increase capacity to communicate with a wide range of individuals so as to elicit and understand whatever has transpired from the perspectives of all parties involved; and
- Acquire the ability to maintain the requisite level of humility so as to accept the fact that maintaining a high degree of impartiality is very demanding and will require constant and life-long attention.

By developing these kinds of skills the Ombuds (or other dispute resolution practitioner) has a strong foundation for thinking and acting as impartially as is possible in a wide variety of situations. By breaking down the aspiration to impartiality in the foregoing fashion, the concept moves from an enigmatic and nebulous principle to a more measurable and demonstrable skill. Equally importantly, it must be reiterated that the literature reviewed and the empirical data collected demonstrate that individuals who aspire to be impartial must always be in a developmental mode, regardless of how high a level of capacity has been demonstrated on previous occasions.

In summary, while I would argue that it is indeed impossible to be perfectly impartial all of the time, highly skilled and committed individuals can operate at a very high

level in this area on an ongoing basis. As the social psychology research<sup>841</sup> and the interview data demonstrates, individuals can get better at thinking and behaving impartially with continued effort and varied experience. Ultimately, I would argue, though, that it is only possible to achieve a high degree of impartiality and maintain this capacity if the Ombuds not only has the motivation to do so but has also mastered the skills associated with thinking and behaving in an impartial manner and is committed to making this effort on a continuous basis.

Contrary to previously cited judicial statements of independence guaranteeing impartiality, the research results convey the reality that the level of impartiality achieved is predominantly the purview of the incumbent. Specifically, impartiality is a matter of thinking and behaving in a way that is reflective of being even-handed with respect to amount of attention given, knowledge acquired, respect shown and diligence demonstrated to both the complainant and respondent. This style of thinking and interaction should be implemented in the same fashion whether the Ombuds has the highest or lowest degree of structural independence in place. Equally importantly, the ability to think and behave as impartially as possible is supported through seeking input from others and considering differing perspectives on the matter under review prior to formulating a conclusion. Therefore, proactivity and outreach is also essential. By making use of a broader and more diverse array of perspectives, similar to the way in which 'structural impartiality' has been endorsed by Sonia Lawrence for the edification of the judiciary,<sup>842</sup> the potential to understand the issues as experienced by the parties involved as fully as possible is greatly enhanced and does not contradict independence. Rather, a high degree of both structural

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<sup>841</sup> See Susan Anderson et al and Nosek and Hansen's results at notes 649 and 654, respectively.

<sup>842</sup> Lawrence, *supra* note 414.

independence and/or an independent mindset allows for this kind of exchange of information to occur in a manner which would be considered to be fair by all involved.

The second part of the research question is: Is independence achievable, aspirational or impossible? As is already well established, a very high degree of structural independence is achievable and verifiable depending on the criteria used for assessing the degree of freedom inherent in the construction of the role. For example, the *Valente*<sup>843</sup> criteria provide for an extremely high degree of independence for the Canadian judiciary. Ombuds that are established by legislation, and in some instances via policy, terms of reference or charter, also enjoy a high degree of structural independence. However, even with that high degree of structural independence in place, it is important to acknowledge that there is no absolute independence. Ultimately, a government or institution or organization can decide it no longer requires or wants an Ombuds role and can repeal or amend the enabling legislation, or revise or remove the policy or terms of reference, respectively, and eliminate the office or change its operations in such a fashion that the office is less independent. Consistent with a high degree of political accountability, in either a democratic society or a hierarchical environment, such an action can be opposed, but there is no means for ensuring an untouchable status regardless of the level of grass roots or institutional support. Therefore, there is no ability to prevent incursions of this nature even if an Ombuds is operating very effectively and enjoys a high degree of structural independence. This is a reality that those who fulfill Ombuds roles must acknowledge and and be prepared for before an appointment is accepted.

Structural independence is tangible and therefore can be achieved as set out in a statute, a policy, terms of reference or a Charter. However, as the research on judicial

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<sup>843</sup> *Valente*, *supra* note 664.



decision-making in particular demonstrates<sup>844</sup>, an individual can enjoy the highest degree of structural independence and still be improperly influenced by both internal and external variables. Therefore, structure alone is clearly not a panacea for the creation of an environment that is entirely free of inappropriate influences. Once again, these data reveal that if an appointee is very resistant to pernicious and friendly influences, due to her commitment to impartiality and the development and maintenance of the requisite skills, she has the capacity to establish and maintain an independent role. However, it must be acknowledged that without a high degree of structural independence the same individual's efforts may be overtly or covertly undermined by institutional resistance to the Ombuds conclusions and recommendations. In those instances, the incumbent has the responsibility to oppose those efforts by making use of the various tools and means at her disposal such as public reporting, access to the most senior decision-makers, well-researched and presented, irrefutable investigative reports and/or trends analyses. Simultaneously, the Ombuds must always keep in mind that the same reality exists with respect to those roles that have a high degree of structural independence in that recommendations can be rejected; or if accepted for strategic reasons by the respondent, worked around or in some instances, ultimately, ignored unless the Ombuds follows up relentlessly.

Echoing the parameter set down by Justice L'Heureux-Dubé in *Régie*<sup>845</sup> - independence is necessary but not sufficient - the data collected from Ombuds demonstrates that a high degree of structural independence, while not determinative, is useful but for a different reason than for the foundation for impartiality. Rather, some degree of separation and freedom to fulfill the role as the Ombuds sees fit must be in

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<sup>844</sup> See Sunstein et al, Stribopoulos & Yahya, Ostberg & Wetstein, Songer, etc.in Chapter 3.

<sup>845</sup> *Régie*, *supra* note 335.

place to demonstrate to the citizenry or students or employees or customers or constituents or civil servants (whoever are the complainants and respondents) that sufficient structural supports are in place to prevent the Ombuds from being perceived to be vulnerable to inappropriate influence. In this arena, as it is the 'perception' that is being addressed it would be difficult for observers to conclude that an individual who has limited structural freedom would be able to maintain an independent role unless they are familiar with his or her work. Ultimately, though, it must be acknowledged that regardless of the degree of structural supports in place, if the incumbent doesn't have the strength of character or courage to go against the grain or take unpopular positions when necessary, and ultimately to speak truth to power, then the structural provisions for independence are irrelevant. As a result, the choice of the individuals who fulfill the Ombuds role and the staff who are hired by the Ombuds to investigate, engage in early resolution modalities, write reports and fulfill the Ombuds' mandate on a daily basis is equally important in my view. Accordingly, it is essential that those who are establishing Ombuds roles and conducting competitions to secure appointees, understand the type of sensibilities and skills an appointee must have developed for as high a degree of personal resolve as is possible to be maintained. Therefore, the appointee's commitment to the highest degree of impartiality coupled with an independent mindset along with the capacity to operate in such a fashion so as to implement this imperative in how the work is actually done is paramount. These personal characteristics complement and in some instances have greater import than the so-called 'guarantees' like arms-length employment status, an independent mechanism for establishing remuneration and administrative or institutional freedom as absent the personal conviction to speak truth to power, the structural freedoms are irrelevant.

As there is no authority for anyone associated with the jurisdiction or organization for which the Ombuds has oversight to interfere with the Ombuds' choice of process to be used and his determination of the appropriate resolution, the Ombuds and staff must have a large repertoire of skills at their disposal to use as means for checking for biases and predispositions that could interfere with the proper handling of a case. Once again, while structural supports are highly desirable (and necessary to prevent termination for reasons other than misconduct or malfeasance) and contribute to the perception of independence for some, in the final analysis, true independence is predicated on impartiality. It is the mastering and maintenance of the aforementioned skills that contribute to the demonstration of the highest level of impartiality of the appointee or Ombuds staff and the resultant perception of independence, of those who are responsible for fulfilling the promise of fairness. At the same time, community members, legislators and funders have to be vigilant in that if an Ombuds is not fulfilling the role properly, they must also be willing to hold the Ombuds to account. Simultaneously, Ombuds must have free rein to do the job properly so holding the Ombuds to account must be done in such a way that the Ombuds' essential oversight role is not circumscribed. Given how difficult it is to do this properly particular attention should be paid to appointing Ombuds and hiring Ombuds staff that have the correct orientation from the outset.

One of the primary roles of an Ombuds as noted earlier is speaking truth to power. While Ombuds have supports in place to fulfill this role on an independent basis, it still requires a great deal of strength of character to stand up to a powerful entity or individual and provide negative information that is new to them or that they already know of but do not want discussed in the public domain. Clearly, this is much easier to do when the appointee has no fear of losing an appointment and her livelihood for doing so, but it still

requires courage of conviction and willingness to deal with a negative reaction irrespective of how the role is structured without losing confidence in the course of action taken.

As said by André Marin, the current Ombudsman for Ontario, "I'm often treated like the proverbial skunk at a garden party. This is not a job that makes you popular with government – if you're doing the job properly".<sup>846</sup> As is readily obvious it can be much easier for legislated Ombuds who work in premises completely separate and apart from the staff employed by the appointing entity and who will not likely encounter respondents or complainants on a casual basis, to deal with such a perception and continue with their work. However, it is a much different scenario for those who work in similar locations as the respondents and complainants, and in smaller organizations, as they regularly encounter all manner of complainants and respondents in their work place. In both contexts, though, I would argue the notion of 'popularity' is irrelevant. Rather, the relationship between the Ombuds and the appointing body and respondents should be that of respect and confidence in the reliability of the Ombuds and staff to operate as impartially and independently as is possible. In addition, Ombuds must also remember the wisdom imparted by Hertogh who found that cooperation and collaboration have far-reaching beneficial results for fairness to prevail for a large part of the constituent population.<sup>847</sup> Given this reality, a working relationship must be achieved whereby impartiality and independence co-exist simultaneously with cooperation and collaboration as is appropriate to the circumstances. The development of this kind of dialectic between Ombuds and respondent while requiring considerable skill is demonstrated throughout Canada on a regular basis where incisive, well researched and documented Ombuds

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<sup>846</sup> André Marin, "The Ombudsman in the Justice System" (The Ontario Bar Association Festive Awards Dinner, Toronto, 1 December 2006) [unpublished] online: Ombudsman Ontario <<http://www.ombudsman.on.ca>>.

<sup>847</sup> Hertogh, *supra* note 306.

reports are promptly accepted or rejected, by all manner of appointing bodies while all forms of early resolution activities are also being undertaken simultaneously and continuously.

It is also axiomatic that the Ombuds role requires humility as the incumbent must be aware that while she has unlimited access to all relevant information she is not necessarily always right in her assessment and must be truly open to alternative points of view and constructive feedback. Similarly, the Ombuds must be careful not to use the power to investigate and her independent status for personal gain or enjoying the adulation that comes from some for the potential for creating fear in an organization or jurisdiction. Rather the power and the prestige associated with the Ombuds role and the willingness of the parties to cooperate should be used to stimulate the desire on the part of both complainants and respondents to 'do the right thing' by pursuing a fair course of action for all concerned. Ultimately, the motivation of all parties should be for fairness to prevail when interacting with one another during the complaint handling process such that officials who are responding to Ombuds' conclusions and recommendations do so enthusiastically rather than on the basis of being fearful of the Ombuds' capacity to publicize various instances of maladministration.

Again, the Ombuds must be careful not to accept the positive or negative media attention, (or the praise that comes from both complainants and respondents), as it may be skewed due to sensationalism for the sake of an attention-grabbing headline or a top story. Similarly, the vigilant Ombuds must be mindful of the fact that easy access to pithy sound bites may have lead to a more positive spin than is necessarily deserved. Hence, brutal honesty and self-assessment must be the order of the day for the Ombuds to judge

his or her effectiveness with respect to the imperative of impartiality and the maintenance of an independent mindset.

I had anticipated that both impartiality and independence would be seen to be very important aspects of fairness from all interviewees' perspectives given traditional constructs for dispute resolution. However, the research results were equivocal on this front. The commentary suggests to me that those who are above the fray believe the parties expect a high level of impartiality and independence but for many complainants and respondents the acid test is: Did I get what I want? As a result, from the complainant's perspective, if the complaint is not supported or from the respondent's perspective, the complaint is not dismissed or considered unfounded, it is only at that point that individuals may question the impartiality and independence and fairness of the Ombuds' intervention. However, if the complainant or respondent get their desired result, little attention is paid to the manner in which the outcome was achieved other than appreciation for the respect given and attention paid to the issues in dispute. For those complainants and respondents who have the capacity to think impartially about their own situation, I suspect the impartiality and independence of the Ombuds is valued and seen as a key contributor to fairness. However, as self-interest and advancement may be the driving force for complainants and respondents, once again, it is up to the Ombuds to engage in critical reflection to determine whether the matter was handled as fairly as possible.

I would argue that the power of recommendation rather than the force of coercion are supportive of both impartiality and independence and the connection to fairness, as this reality requires the Ombuds to *convince* the parties of the correctness of her view in order for the dismissal of a complaint or for conclusions and recommendations to be accepted. Accordingly, the early resolution or investigative work undertaken by the

Ombuds and staff has to be done extremely well and communicated well. Rather than taking away from the effectiveness of the Ombuds role this defining criterion - non-binding recommendations - is beneficial rather than detrimental as having conclusions and recommendations accepted on the basis of the quality of the work and the arguments made is the ideal manner in which to effect change and build an ethos of fairness overall. At the same time, the Ombuds has to be able to deal with a conclusion being discounted and/or recommendations not being accepted and not be demoralized as even the best argument may be rejected for reasons beyond the Ombuds' control. This kind of dynamic requires the Ombuds to maintain an impartial stance and not react in a negative manner or develop a personal bias against the decision-maker or the complainant in these circumstances. Ultimately the Ombuds must have the courage to proceed with humility rather than a 'win/loss' mentality to accept the reactions of both complainants and respondents, whatever they are, and analyze them to see where the Ombuds could have improved the explanation of the rationale, and have the confidence in what has been done, if it was done well, to move forward and address other issues.

This research reveals conclusively that the concept of indifference, detachment and distance from the individuals whose actions are being reviewed is no longer the hallmark of impartiality and in fact the opposite is the case. Rather, empathy<sup>848</sup> coupled with self-awareness and self-discipline is actually the essence of impartiality. In order to think and act in an impartial manner the practitioner must be able to appreciate and understand to the extent that it is possible to do so, the contextual reality, motivations and understandings of all parties involved in the dispute. As a result, I would argue that

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<sup>848</sup> McCormick and Green identified compassion, sensitivity, tolerance and an appreciation of the pressure experienced by those who appear before them under the heading of 'empathy' as a quality that was valued by individual judges and admired in those judges who were able to maintain a high degree of empathy under difficult circumstances, (e.g. when exposed to values, attitudes and lifestyles that were different from their own). See note 422 at 107.

Ombuds Codes of Ethics and Standards of Practice should emphasize the importance of empathy and the ongoing requirement to learn more about the lives of people with whom appointees normally have no contact with or know little about in order to fulfill the role correctly. In the same trajectory, both the research on judicial decision-making and my interview data demonstrated that soliciting input from those who occupy different social locations than the appointee, with respect to social and demographic characteristics as well as values and belief systems is very advantageous with respect to thinking about an issue in an impartial manner. In the same fashion as described above, the highly evolved practitioner has to work at being impartial by continually attempting to see the world from the perspectives of those whose views and experiences are dramatically different from her own. To rely solely on her own experience, education and value system is akin to assuming that by accepting a position of Ombuds or as an Ombuds staff person you have also been granted the mantles of impartiality and personal independence. My empirical results and the secondary research presented as well as my own experience demonstrates that neither impartiality nor an independent mindset is given, attained or achieved in its entirety. Rather every effort must be made to examine one's own beliefs, values and predispositions as well as understanding and appreciating what others know and believe that conflicts with the Ombuds world view. Only then does the Ombuds have a foundation for thinking and behaving as impartially as possible and operating independently in a manner that is fair to all concerned.

Concomitantly, as a result of the research conducted for this study a number of areas that are ripe for further or new exploration have emerged. For instance, it would be very useful to develop some means for assessing what is the best preparation for an effective Ombuds and staff members, (e.g. early resolution staff, investigators, managers,



Directors, Deputy/Associate Ombuds) so as to predict and perhaps even ultimately ensure that the resources dedicated to Ombuds roles are used to best advantage. A possibility may be the development and testing of a 360-degree assessment process whereby knowledgeable informants (including complainants and respondents) are invited to confidentially rank Ombuds and staff performance in key areas, (e.g. demonstration of impartiality and independence; effective communication skills). The results obtained could then be compared to the academic and professional backgrounds of the individuals being assessed to determine what type or types of backgrounds are the best predictors for the demonstration of impartiality, independence and fairness. At the same time, this method of research could be used to determine the best means for soliciting this kind of feedback so as to reduce the potential for any attempt to use the data collected to impinge on the independence of the role. This kind of modality would also be applicable to third parties who are required to and are desirous of operating at the highest levels of impartiality, independence and fairness like judges, arbitrators, mediators, adjudicators, etc.

Another valuable area for further exploration is to rigorously inquire into how Ombuds and other individuals who assist with dispute resolution, whose social locations educationally, financially, culturally are very far removed from those whose actions they are in place to assist or evaluate, can bridge those differences. Given the importance of empathy to impartiality and given how difficult it is for those who are very privileged to know or remember what it is like to have no or very little privilege, this area of research would benefit not only Ombuds and staff but all manner of third parties whose decisions have life-changing impact. While the capacity to empathize has been studied in the judicial decision-making context by a variety of researchers, I would encourage undertaking additional empirical studies, similar to the one undertaken by Jill D. Weinberg and Laura

Beth Neilsen that was reported on in "Examining Empathy: Discrimination, Experience & Judicial Decision-making"<sup>849</sup> not only to assess capacity but also to determine how best to assist individuals to increase their capacity to empathize.

Following on the judicial decision-making research that demonstrated men and women decide issues differently, it would be beneficial to assess this likelihood in the Ombuds and ADR arena generally. It would be useful to know if women who are Ombuds operate differently than men who are Ombuds, and if so, what approach(es) are the most effective and fair.

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<sup>849</sup> Jill D. Weinberg & Laura Beth Neilsen, "Examining Empathy: Discrimination, Experience & Judicial Decision-making" (2012) 85 Southern California Law Review 313.

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## Appendix A

Nora J. Farrell  
11 Edgedale Road  
Toronto, ON M4X 1N5

DATE

Name and address of  
Potential Interviewee

Dear .....

I am writing this letter to ask if you would consent to speak with me. I am conducting research on the conceptualization and implementation of the principles of independence, impartiality and fairness as they relate to the practice of ombudsmanship. As you have been practicing in .....or since you are the ....., I believe that you would be an excellent person to speak with about these topics. I anticipate taking no more than (60) sixty minutes of your time. I would be very interested in meeting with you at some point over the next six weeks, if your schedule permits. I'd be happy to meet with you whenever and wherever it is most convenient for you, e.g. before or after work at a location that is suitable to you or at your office, during office hours.

Among the specific issues I would like to canvass with you are the practical application of the concepts of impartiality, independence and fairness. In addition, I would like to understand how you determine whether complaints are founded or not.

Our meeting would be more like a consultation or discussion than a formal interview. I am now a Ph.D. student at Osgoode Hall Law School and my intention is to use the notes from our discussion in my dissertation. Dissertations are published, but not widely circulated. As well, I might later wish to publish an academic article that is informed by our discussion.

Needless to say, you are under no obligation to meet with me or to answer any of my questions, and you may call the session to a close at any time. Normally I take notes and tape record only to assist my note taking. I would be pleased to speak with you on a not-for-attribution basis or, if you prefer, to attribute comments that you make, or ideas we have discussed. However, if I do wish to quote you by name or in any way that could be attributed to you, I undertake to provide you with a copy of the intended quotation. You will have the opportunity to revise any comment associated with your name.

The notes and tape recordings from our discussion will be kept in locked storage for a period of at least two years. I will treat the notes as confidential to the limit allowed by law, as is York University's policy. Neither the topics we will discuss, nor any writing I will do afterwards is intended to be a "report card" on any person or organization, and I do not anticipate you providing me with information that might be considered confidential or "off the record". Please be aware that if you decide that you would like to withdraw from the

study, as soon as I receive your request, all associated data collected, will be immediately destroyed where possible.

This research project has been reviewed and approved for compliance with the Faculty of Graduate Studies policy on research ethics and with the research ethics protocols required by the Human Participants Review Subcommittee (HRPC) of York University. If you have questions or concerns you are welcome to contact the Manager, Office of Research Ethics, York University, York Lanes at 416.736.5914 or my Graduate Program Office at Osgoode Hall Law School and speak to the Graduate Program Director, Ben Richardson, at 416.736.5431. If you are willing to speak with me, at the interview, I will ask you to sign and date my copy of this letter to ensure that you have given your informed consent.

I look forward to hearing from you, but I will also be in touch with you within the next few days to see if a convenient time for this meeting can be arranged. Please do not hesitate to be in touch with me if you have any questions or concerns. I can be reached at [NoraFarrell@osgoode.yorku.ca](mailto:NoraFarrell@osgoode.yorku.ca) and 416.922.8984.

Thank you very much for your consideration of my request.

Nora Farrell, Ph.D. Candidate

I consent to have this discussion. \_\_\_\_\_

\_\_\_\_\_  
(Signature of Interviewee)

\_\_\_\_\_  
Date

With Attribution \_\_\_\_\_ Without Attribution \_\_\_\_\_



## Appendix B

### Independence

- 1) How do you define 'independence'?
- 2) Legal and political science scholars and Supreme Court jurists have stated that independence is a guarantor of impartiality. How does that fit with your view of the connection between independence and impartiality as an Ombuds?

### Impartiality

- 3) How do you define 'impartiality'?
- 3a) Do you think there's a difference between neutrality and impartiality?
- 4) There is a great deal of research data derived from extensive reviews of judicial decision-making both in the U.S. and Canada demonstrating that some judges' decisions can be predicted on the basis of party of appointment and, in some cases, gender. Do you think Ombuds would be viewed differently than judges in this regard? If the answer is 'no', discuss the rationale for this belief and then go to Question 8.
- 5) [a] If the answer is 'yes', how have you come to this conclusion? Why do you think Ombuds are different than the judges whose decisions were analyzed?
- 5) [b] Many modern thinkers and philosophers believe that it is impossible for people to be objective. Some social psychologists, Susan Anderson in particular, has found that many people are governed by what is called 'automatic thought' which includes stereotypes that immediately pop into our minds based on audio and visual cues. Wendell Jones, a physicist and former Ombudsman and Scott Hughes, a lawyer and professor, argue that our biases are hardwired in our brains and that it is impossible to eliminate them. What do you think about these beliefs?
- 5) [c] Have you ever been in a situation where you have had to consciously address a bias that you yourself recognized you brought to a particular dispute or complaint? What kinds of strategies did you use to guard against bias influencing your review or involvement in the situation?
- 6) Do you believe that it is possible for Ombuds to be seen to be impartial, if they do not have a high degree of structural independence. (e.g. the Ombuds reports to a Minister within government or the President or Vice-President of the organization)?
- 6) [a] If so, how do Ombuds in this situation (or, how do you) demonstrate impartiality?
- 7) Following from Question 4: Since you believe that people can't be impartial or independent, how do you deal with the fact that virtually all Ombuds' legislation, Charters, Terms of Reference and promotion materials describe the role of Ombuds as 'independent and impartial'?

## Fairness<sup>850</sup>

8) How do you determine whether or not to:

- Act on an inquiry in response to a complaint
- Support or dismiss a complaint (if a classical or hybrid Ombuds)

[Note: if the above information is articulated in the legislation, Charter or Terms of Reference for the position of the interviewee I didn't ask the above question.]

9) [a] Do you use a particular framework for determining whether or not decisions have been made fairly by respondents? If 'yes', can you describe it to me? If 'no', how do you decide whether or not a complaint should be supported?

9) [b] In many areas of decision-making the individual who has investigated the allegation and laid the charge is prohibited from deciding who is 'guilty or innocent' of wrong doing. However, classical and hybrid Ombuds routinely investigate allegations and render an opinion on whether or not a decision made or action taken was done so fairly. Do you think this overlap of responsibilities should be a concern for hybrid and classical Ombuds?

Note: If an interviewee indicated that Ombuds can not be impartial and/or independent I did not ask Questions 10 (c) and (d) shown below. Instead I asked:

10) What criteria do you think people who you interact with use to determine whether or not you have treated them fairly?

### Independence, Impartiality and Fairness

10) [c] Do you think your ability to be and be seen to behave fairly is connected either to independence or impartiality (or to both independence and impartiality)?

10) [d] Do you think complainants and respondents would accept your interventions, conclusions and recommendations as being fair if you were not seen to be independent and/or impartial?

### Certification

11) There has been much discussion of certification of individual Ombuds and Ombuds offices to demonstrate they have met certain standards and qualify as 'professional Ombuds' in the U.S.A. Do you think this is an appropriate evolution for Ombuds in Canada? If the answer to this question is 'no', discuss why this view is held and go to Question 12 (b)

12) If you agree with certification, who do you think should determine the criteria that have to be met?

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<sup>850</sup> Some interviewees were not asked Questions 9 – 10 as they do not make determinations on fairness.

12 a) Would those criteria include some mechanism for an appropriate demonstration of impartiality, independence and fair decision-making? [Note: I modified this question to relate to fairness only if an interviewee had already indicated that independence and/or impartiality are impossible to achieve.]

12 b) In your opinion, should there be any restriction on the use of the term Ombuds/man/person?

12 c) If so, what entity should determine who can use the term of Ombuds/man/person?

## Appendix C

The locations of the interviews are not provided as, in some instances, they could easily identify the interviewee.

April 16, 2009

April 17, 2009

June 24, 2009

July 3, 2009 (2 interviews)

July 15, 2009

July 17, 2009

July 22, 2009

August 4, 2009

August 17, 2009

August 21, 2009

August 24, 2009 (2 interviews)

August 26, 2009

September 1, 2009

September 14, 2009

September 23, 2009

September 24, 2009

October 1, 2009

October 7, 2009